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No. 719

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

COMMERCIAL COMMUNICATIONS, INC., ET AL.

AND

WATSON COMMUNICATIONS SYSTEMS, INC., ET AL.

Appellants

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

AND

PACIFIC TELEPHONE AND TELEGRAPH COMPANY

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

JURISDICTIONAL STATEMENT

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February 21, 1959.

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JURISDICTIONAL STATEMENT

The above-captioned appeals are from the Supreme Court of California's decision in a consolidated proceeding which affirmed an order of the California Public Utilities Commission. That order accepted a so-called "tariff" filed by the Pacific Telephone and Telegraph

Company for radio equipment rentals over the protest of numerous persons adversely affected by the Telephone Company's effort to take over this private competitive business. Inasmuch as these appeals present analogous issues, a single Jurisdictional Statement on behalf of all appellants is being filed in accordance with Rule 15(3) of this Court.

OPINIONS BELOW

The majority and minority opinions of the Supreme Court of California (App. A, *infra*, pp. A1, A14) are reported at 50 Cal. 2d 512; 327 P. 2d 513. The opinion of the Public Utilities Commission of the State of California is reported at 55 Cal. P. U. C. 387.

JURISDICTION

On January 29, 1957, the Public Utilities Commission of the State of California approved a "tariff" filed by Pacific Telephone and Telegraph Company. On August 30, 1957, the Supreme Court of California at the instance of these appellants and others issued a writ of review as to the Commission's ruling, but on June 27, 1958, after consideration of briefs and oral argument, affirmed the order of the Commission by a 4-3 decision. On July 23, 1958, the California Supreme Court by a 4-3 decision denied timely filed petitions for rehearing and reconsideration. Notice of appeal to the Supreme Court of the United States was filed in the Supreme Court of California on October 17, 1958 by these appellants, and on November 12, 1958 the Chief Justice of the Supreme Court of California pursuant to Rule 13(1) of this Court granted until February 22, 1959 to docket the instant record here.

The jurisdiction of this Court is conferred by Title

28, United States Code, Section 1257(2). Jurisdiction of this Court to review the judgment of the Supreme Court of California by appeal is confirmed by *Cities Service Gas Co.* v. *State Corporation Comm'n*, 355 U.S. 391 (1958); *Natural Gas Pipeline Co.* v. *Panoma Corp.*, 349 U.S. 44 (1955); *Atchison, T. & S. F. Ry. Co.* v. *Public Utilities Comm'n of California*, 346 U.S. 346 (1953); and *La Crosse Tel. Corp.* v. *Wisconsin Employment Relations Board*, 336 U.S. 18 (1949).

STATUTORY PROVISIONS INVOLVED

Sections 2(b), 3(e), 301 and 313 of the Communications Act, 47 U.S.C. §§ 151 *et seq.*, are excerpted in Appendix B (pp. A23-24, *infra*). The court below also considered several California statutory and constitutional provisions.

QUESTIONS PRESENTED

The Supreme Court of California held that the Public Utilities Commission's approval of a voluntary "tariff" filing permitted the Telephone Company to engage in the private radio equipment business, notwithstanding the 1956 federal antitrust decree which confined AT&T and its subsidiaries (including Pacific Telephone and Telegraph Company) to the performance of common carrier communications services. Furthermore, the California Supreme Court ruled that the Commission's public utility controls were not invalidated by the Communications Act of 1934 which vests plenary control of the radio spectrum in the Federal Communications Commission and declares the paramount federal policy of competition in radio communications and equipment. Finally, the California Supreme Court decided that the Fourteenth Amendment

to the Constitution of the United States was not offended by the Commission's regulation permitting a telephone monopoly to invade the private radio business where numerous independent firms operate on a free and competitive basis.

Accordingly the questions presented are:

(1) Whether a state agency can exempt a corporation from the prohibitions of a judicial decree of the United States enforcing the federal antitrust laws;

(2) Whether the Communications Act's paramount federal policy of fostering competition in the development of radio over the public airwaves does not preclude individual states from imposing utility regulation on the private radio business;

(3) Whether the Due Process and Equal Protection clauses of the Fourteenth Amendment are not infringed by state utility controls sought by a telephone monopoly to take over markets served by numerous independent competitors.

STATEMENT

On January 24, 1956, the United States District Court for the District of New Jersey entered a decree terminating an antitrust action by the United States against Western Electric Company and American Telephone and Telegraph Company under the Sherman Act. In pertinent part, Section V of that consent decree perpetually enjoined AT&T and its subsidiaries (including Pacific Telephone and Telegraph Company) from engaging "in any business other than the furnishing of common carrier communications services." A proviso in Section V exempted several specified non-common carrier activities from this prohibition, including, for a five-year period ending in January 1961, "leasing and

maintaining facilities for private communications systems, the charges for which are not subject to public regulation." [1]

On March 30, 1956, Pacific Telephone and Telegraph Company, a subsidiary of AT&T, filed with the Public Utilities Commission of the State of California a so-called tariff Schedule No. 108-T of monthly charges for the combined rental and maintenance of mobile radio communications equipment on a package basis as a public utility service to private customers licensed by the Federal Communications Commission. Identical radio equipment had long been marketed, on a sale or lease basis, by a number of suppliers, and was distributed and serviced in California and elsewhere by numerous independent business organizations, such as these appellants. Whether marketed by the Telephone Company or independent competitors, such equipment was operated over radio frequencies granted by the Federal Communications Commission to individual licensees, (e.g., taxi fleets or police organizations) solely for private vehicular intercommunication. 47 Code Fed. Regs. § 16.1 *et seq.* (1958). Save for emergencies, the equipment thus permitted communication by radio only among the moving vehicles employed in the licensee's own private business, and not with the Telephone Company's public telephone network.

The Public Utilities Commission's approval, without hearing, of this tariff was protested by several adversely affected competing concerns as well as the City of Los Angeles. Apart from asserted deficiencies under California law, the tariff was challenged as a ruse by the Telephone Company for converting a private competi-

[1] See note 8, *infra*, for text of the decree provision.

tive business into a "public utility service" in order to circumvent the restrictions of the antitrust decree.[2]

After a subsequently instituted administrative proceeding, the Public Utilities Commission rejected these contentions on January 29, 1957. 55 Cal. P.U.C. 387. The Public Utilities Commission declined to "take judicial notice of good or bad intentions" by the Telephone Company in the absence of proof, and declared:

> "In any event, it is for the federal courts, and not for this Commission, to implement their decisions; and the Consent Decree seems specifically to assume that such activities as the one here in contemplation can be rendered by applicant without any injurious effect on the public welfare, so long as such activities are regulated by state commissions. We believe that, if this is the implication of the Consent Decree, it is a fully justified position. If the federal court had wished to bar such activities by the applicant even though subjected to regulation, it would have made such provision and the question would not be before this Commission. So far as the effect of the Consent Decree is concerned, it is not actually pertinent to the issues in this case." 55 Cal. P.U.C. 387, 399 (1957).

It "appearing" to the Supreme Court of California that the Public Utilities Commission had "exceeded [its] authority and jurisdiction," that court on August 30, 1957 granted petitions by these appellants and the City of Los Angeles to review the Commission's ruling.[3]

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[2] These contentions and the bar of the federal Communications Act were also urged by appellants and others in briefs filed with the Commission, and in petitions for rehearing of the adverse Commission decision.

[3] The petitions reiterated the illegality of the Commission's ruling by reference to the antitrust decree and the paramount provisions of

After a consolidated review proceeding in which the Telephone Company participated as real party in interest, a 4-3 decision of the California Supreme Court on June 27, 1958 affirmed the Commission in all pertinent respects.[4] 50 Cal. 2d 512; 327 P. 2d 513 (1958). (App. A, pp. A1-13, *infra*).

Besides disposing of the issues of state law adversely to appellants, the majority opinion perceived no infringement of the Fourteenth Amendment. (Pp. A9-10, *infra*). The majority also resolved against appellants the "question of any probable conflict between the jurisdiction of the federal and state commissions and of an alleged limitation on the state commission by reason of the provisions of the New Jersey consent decree hereinbefore referred to." (P. A11, *infra*).

As to these federal issues, the court held that the state commission's jurisdiction was not displaced by the Communications Act of 1934. (P. A11, *infra*). The court also considered and rejected the position of the United

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the federal Communications Act, and also challenged the Commission's action as contrary to the Equal Protection and Due Process clauses of the Fourteenth Amendment to the Constitution of the United States.

The Public Utilities Commission's Answer to Petitions for Review acknowledged that "While it may well be that the Pacific Company decided to dedicate itself to provide the installing, leasing, and maintaining of private mobile communication systems as a public utility service so that there could be no doubt of the California Commission's jurisdiction over the rates for such service, and so that in turn there could be no doubt of satisfying the condition imposed by the consent decree, it is obvious that there is nothing unlawful in such a decision." P. 6.

[4] The contentions of the several petitions for review, including appellants, and the *amici curiae* were thus summarized below: "The petitioners urge that the commission has incorrectly determined in favor of its own jurisdiction in this matter and contend that their rights under the Constitution of the United States and of this state are violated. They also urge that the tariff creates a conflict with federal law and with the provisions of a consent decree to which Pacific, as a subsidiary of American Telephone and Telegraph Company, was a party." (P. A2, *infra*).

States Department of Justice, expressed before the Federal Communications Commission, that the antitrust decree was an absolute bar to efforts by AT&T or its subsidiaries to engage in the private communications equipment business by tariff filings before regulatory agencies.[5] (P. A12-13, *infra*). Instead, the court quoted a now rescinded dictum by the Federal Communications Commission that "it had been unable to find any basis in the specific language of the consent decree to support the contention of the Department of Justice that it was the intent of that decree to prohibit the service, regulated or unregulated."[6] (P. A13, *infra*). The court

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[5] On February 21, 1957, AT&T also filed with the Federal Communications Commission a so-called Tariff No. 235 purporting to submit charges for private mobile radio equipment rentals and servicing to FCC regulation. This tariff was subsequently "suspended" by the Commission. *American Telephone & Telegraph Co.*, Dkt. 11972; 22 F.C.C. 1220 (1957); 23 F.C.C. 689 (1957). The United States Department of Justice advised the FCC on March 27, 1957, September 6, 1957, October 4, 1957, and October 14, 1958 that the Telephone Company tariff proposal was barred by the provisions of the antitrust decree; was beyond the Commission's regulatory jurisdiction; provided for "tying arrangements" in violation of Section 3 of the Clayton Act; and raised serious questions under the Sherman Act. Dkt. 11972. On February 10, 1959, AT&T withdrew that tariff in view of the "controversy" under the antitrust decree raised before the FCC, but announced its intention to engage in the same business under slightly different arrangements.

[6] Insofar as the Federal Communications Commission may have disputed the Department of Justice, this appears no longer so today. In *Connecticut Water Co.*, 25 F.C.C. 1367, 1377-79 (1958), the Commission held that another AT&T subsidiary had violated the pertinent provisions of the antitrust decree by unlawful lease-maintenance arrangements for private mobile radio equipment. The Commission thereafter instituted a rule-making proceeding to implement the decree pursuant to the Commission's "obligation to consider relevant anti-trust matters in its general public interest determinations in its licensing functions." Federal Register, January 8, 1959, p. 219. The public notice advised that "The Commission has assumed no position at this time concerning the effects, if any, on the Consent Decree restrictions if such equipment lease-maintenance activity has been found or may be found, by any jurisdiction, to be 'the furnishing of common carrier communications services' and/or if the charges therefor are or may become 'subject to public regulation.'

affirmed the order of the Public Utilities Commission and its opinion that "if the federal court wished to bar such activities by Pacific even though subject to regulation, it would have made such a provision, and that there was nothing in the decree to prompt it to change its ruling that this service was utility service subject to its jurisdiction." (P. A13, *infra*).

The dissent by three Justices of the California Supreme Court proposed to "annul" the Telephone Company's tariffs under state law, and thus had no occasion to resolve the federal questions. The dissenting Justices nevertheless scored the Commission's "official approval to the unwarranted invasion of a free market by the entering wedge of what appears to be a design for eventual monopolistic sequestration of the field." (P. A14, *infra*). According to the minority Justices,

> "The result of the majority decision upholding the order of the commission will be a tendency to promote monopoly in a field of business operation which is and should remain in the realm of free enterprise." (P. A19, *infra*).

THE QUESTIONS ARE SUBSTANTIAL

This appeal presents issues of far-reaching import in the reconciliation of state action with the paramount authority of federal antitrust decrees as well as the radio policies of the Communications Act in favor of competition, and raises a novel and substantial question as to the limitations of the Federal Constitution on state regulation sought by a monopoly to take over a private competitive business.

Comments or arguments on these points are invited herein for the purpose of aiding the Commission in the development of a position thereon." *Ibid.*

1. ***By authorizing the Telephone Company to engage in the private radio business contrary to the prohibitions of the antitrust decree, the California decision creates a sanctuary from the antitrust laws of the United States.***[7]

The *Western Electric/AT&T* antitrust decree represents a historic application of the antitrust laws to the communications industry of the United States. While that decree preserved the Western Electric/AT&T nexus intact, it confined AT&T and its subsidiaries to "common carrier communications services," with several specified exceptions, including the leasing and maintaining of private radio equipment during a five-year grace period.[8]

The California Supreme Court's decision threatens to nullify the restrictions of the federal decree. If the decree's ouster of the Telephone Company from non-

[7] The effectuation of federal decrees enforcing the United States Constitution in another context may create similar problems. Compare *Cooper* v. *Aaron*, 358 U.S. 1, 18 (1958); *James* v. *Almond*, 27 U. S. L. Week 2361 (E.D. Va. Jan. 19, 1959).

[8] Section V of the antitrust decree provides as follows: "The defendant AT&T is enjoined and restrained from engaging, either directly or indirectly through its subsidiaries other than Western and Western's subsidiaries, in any business other than the furnishing of common carrier communications services; provided, however, that this Section V shall not apply to (a) furnishing services or facilities for the plaintiff or any agency thereof, (b) experiments for the purpose of testing or developing new common carrier communications services, (c) furnishing circuits to other communications common carriers, (d) for a period of five (5) years from the date of this Final Judgment, *leasing and maintaining facilities for private communications systems, the charges for which are not subject to public regulation*, to persons who are lessees from defendants or their subsidiaries of such systems forty-five (45) days after the date of this Final Judgment, (e) directory advertising, (f) advice or assistance to other communications common carriers, or (g) businesses or services incidental to the furnishing by AT&T or such subsidiaries of common carrier communications services." *United States* v. *Western Electric Co., Inc. and American Telephone & Telegraph Company*, Civ. No. 17-49, 1956 CCH Trade Cases, par. 68, 246 (D. N. J. 1956) (emphasis added).

common carrier private businesses (other than the exempted directory advertising, government contracting, etc.) is avoided by the Telephone Company's voluntary submission to state regulatory commissions through the device of "tariff" filings, the decree becomes a porous paper fostering rather than restricting monopoly. For then AT&T and its subsidiaries could usurp and monopolize *any* private communications business in the future, so long as a "tariff" was approved by a regulatory Commission.

Such a holding is in direct conflict with paramount federal law. Federal supremacy in the field of antitrust requires that state authorization of arrangements contrary to a Sherman Act decree "must yield to the Act's declaration that such agreements are unlawful." *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 177 (1942). Above all, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. *Northern Securities Co.* v. *United States*, 193 U. S. 197, 332, 344-347." *Parker* v. *Brown*, 317 U. S. 341, 351 (1943).[3]

The authorization granted by the Supreme Court of California to the Telephone Company, contrary to the federal antitrust decree, presents a vital issue warranting plenary review. Civil antitrust proceedings often culminate in remedial decrees which seek to restore and preserve competitive conditions in an industry. If State tribunals may interpose their authority so as to thwart the federal plan of the decree, a new avenue to circumvent the antitrust laws is opened. Compare

[3] See also *Local 24 of I.B.T.* v. *Oliver*, 358 U. S. 283 (1959); *Asheville Tobacco Board of Trade* v. *Federal Trade Commission*, 27 U. S. L. Week 2390 (4th Cir. Jan. 20, 1959); *Royal Oil Corp.* v. *Federal Trade Commission*, 27 U. S. L. Week 2351 (4th Cir. Jan. 5, 1959).

Northern Securities Co. v. *United States,* 193 U. S. 197, 345-47 (1904); *Sola Electric Co.* v. *Jefferson Electric Co.,* 317 U. S. 173, 176 (1942); *Schwegmann Bros.* v. *Calvert Corp.,* 341 U. S. 384, 389, 395 (1951).[10]

2. *The state public utilities regulation of the private radio business conflicts with the paramount federal policy of the Communications Act for the competitive development of radio.*

The federal Communications Act of 1934 establishes a pervasive and plenary policy for the development of the radio art on a competitive basis in order to promote the maximum benefits for the American people from the public radio spectrum. Title III of the Act maintains the "control of the United States over all the channels of interstate and foreign radio transmission," and vests the Federal Communications Commission with authority to assign temporary licenses for radio frequencies utilized in conformity with the statute and regulations.[11] In the furtherance of this objective, the Act provides for detailed controls by the Commission over the operations and apparatus of radio licensees. Sections 303, 308, 310; 47 U. S. C. §§ 303, 308, 310. Also, coupled with a mandate that the Com-

[10] The precise powers of state courts with respect to a federal antitrust decree are not settled. Compare *Straus* v. *American Publishers' Ass'n,* 231 U. S. 222, 237 (1913); *Lyons* v. *Westinghouse Electric Corp.,* 222 F. 2d 184, 189-190 (2d Cir. 1955), *cert. denied,* 350 U. S. 825 (1955); *United States* v. *Bayer Co.,* 135 F. Supp. 65 (S.D. N.Y. 1955). Significantly, the Expediting Act confers exclusive appellate jurisdiction on this Court to review antitrust decrees. *Swift & Co.* v. *United States,* 276 U. S. 311 (1928); *United States* v. *California Co-operative Canneries,* 279 U. S. 553 (1929).

[11] Compare *Allen B. Dumont Laboratories* v. *Carroll,* 184 F. 2d 153, 155 (3d Cir. 1950), *cert. denied,* 340 U. S. 929 (1951); *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 214 (1943); *Federal Communications Commission* v. *Sanders Bros.,* 309 U. S. 470, 474 (1940).

mission "generally encourage the larger and more effective use of radio in the public interest," the Act incorporates and applies to radio communications as well as "apparatus and devices" the antitrust laws' prohibitions on trade restraints and monopolization, and expressly directs the Federal Communications Commission to enforce against common carriers the Clayton Act's ban on exclusive and tying arrangements. Sections 303(g), 313, 602(d); 47 U. S. C. §§ 303(g), 313; cf. 15 U. S. C. §§ 14, 21.

A direct conflict with the Communications Act results from the Supreme Court of California's approval of the Telephone Company tariff. The court misconceived the scope and significance of the limited exemptions in that statute which permit some intrastate regulation by State commissions, *subject to* the paramount policies of the radio provisions of the Act.[12] The court not only ratified state utility controls over radio equipment in disregard of the express powers entrusted in the Federal Communications Commission by Congress. It also sanctioned a voluntary tariff covering a Telephone Company "package" rate for the leasing and maintenance of radio equipment (including replacement and spare parts) despite the prohibitions of the antitrust laws on monopolistic tying arrangements.[13] In net effect, the state obligated the Telephone Com-

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[12] See, *e.g.*, 47 U. S. C. §§ 152(b), 153(e), excerpted at pp. A23-24, *infra*; and compare *Benanti* v. *United States*, 355 U. S. 96, 105 (1957), 67 Yale L. J. 932 (1958), where the Court deemed these exceptions of a "limited" and "technical nature" by contrast with the broader policy considerations underlying the Act.

[13] Cf. *Northern Pacific Ry. Co.* v. *United States*, 356 U. S. 1, 4 (1958). The virtually identical AT&T Tariff No. 235 was viewed by the Department of Justice as illegal *per se* under the Clayton Act on its face, in probable violation of the Sherman Act, and contrary to the public interest in a competitive communications industry. See note 5, *supra*.

pany as a public utility to perform business arrangements with licensees of the Federal Communications Commission—whose licenses would then have to be set aside for being based on equipment contracts that violate the federal antitrust laws as well as the federal antitrust decree. Cf. *Connecticut Water Co.*, 25 F. C. C. 1367, 1379 (1958).

This collision of California law with the federal Communications Act raises issues of prime national concern. Because of the potential of the electronics art for providing an economical means of private radio communication over the public airwaves on a competitive basis, the legal framework for this development is of critical importance. If private radio communications may be taken over by telephone monopolies under the sponsorship of state utility commissions, as held below, the Congressional design becomes a blueprint for the monopolistic exploitation of the radio spectrum contrary to Title III of the Communications Act.

Only this Court can draw the line between permissible State jurisdiction over local communications and unlawful encroachments on the domain of competitive enterprise in radio sponsored by state regulatory bodies. The accommodation between state action and the paramount policy of the Communications Act in other areas has not only evoked this Court's review in the recent past,[14] but becomes of mounting public concern as the uses of the radio spectrum are advanced by a dynamic technology.

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[14] Cf. *Benanti* v. *United States*, 355 U. S. 96 (1957); *Farmers Educational and Cooperative Union* v. *WDAY*, No. 248, O. T. 1958.

3. *State utility control sought by a monopoly to take over a competitive business raises substantial questions under the Fourteenth Amendment.*

Voluntary or procured "regulation" by a corporation is the antithesis of recognized Constitutional processes for protecting the public. As summarized by the dissenting opinion of Justice Stone, joined by Justices Holmes and Brandeis, in *Tyson & Bro.* v. *Banton,* 273 U. S. 418, 447 (1927):

> "Statutory regulation of price is commonly directed toward the prevention of exorbitant demands of buyers or sellers. An examination of the decisions of this court in which price regulation has been upheld will disclose that the element common to all is the existence of a situation or a combination of circumstances materially restricting the regulative force of competition, so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that serious economic consequences result to a very large number of members of the community." *Id.* at 451-452.

In short, the Constitutional premise for utility controls lies in the absence (or suspension) of the "regulative force of competition," so that the protection of the public from monopolistic exactions must be reposed in their government.

But without these necessities which *require* regulation, utility controls may stifle competition and promote monopoly, in conflict with the creed of a competitive enterprise system.[15] As traced by Judge Learned

[15] Cf. Adams & Gray, *Monopoly in America, The Government As Promoter* c. III (1955); Hamilton, *The Politics of Industry* cc. III, V (1957); Book Review, 68 Yale L. J. 614 (1959).

Hand, the American antitrust philosophy assumes that "possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone." *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 427 (2d Cir. 1945). In the words of this Court, "Basic to the faith that a free economy best promotes the public weal is that goods must stand the cold test of competition; that the public, acting through the market's impersonal judgment, shall allocate the Nation's resources and thus direct the course its economic development will take." *Times-Picayune Pub. Co.* v. *United States,* 345 U. S. 594, 605 (1953).

Every premise supporting public utility controls is warped in the case at bar. While the state court's interpretation of California statutes is binding here, neither the pertinent provisions nor the opinions below reflect a rational reason why the private radio business in California should be deemed a "public utility," or how free competition in the radio industry has failed to serve the needs of the people of that State.

Indeed, no rational explanation *can* exist. Unlike the public telephone network, a "natural monopoly" where duplication of facilities to provide competition would be exorbitant and wasteful, there is no rationalization for monopoly in the private radio communications business. The evidence reported by the State Commission discloses that this "is in fact a highly competitive industry in which over 100 persons are

directly engaged in California alone." 55 Cal. P. U. C. at 393.[16]

The three minority judges below perceived the "realities of the situation": "Pacific, by its purported dedication of its private mobile radiotelephone equipment and maintenance service and its filing of a tariff schedule, cannot impart the character of a true public utility into that which is essentially a highly competitive private enterprise. The action of the commission, in the premises, gives official approval to the unwarranted invasion of a free market by the entering wedge of what appears to be a design for eventual monopolistic sequestration of the field." (P. A14, *infra*). Furthermore,

> "Surely the commission is not presuming that Pacific is altruistic in filing schedules for its activities in this field. And certainly Pacific has the right to seek expansion, diversification, and increased profits—but not by the process of bringing disparate segments of private enterprise into its monopolistic domain. * * * The decision of the majority places the stamp of approval upon bureaucratic recognition, as well as control, of Pacific in a type of business which has not been shown to require regulation as a monopoly. The private mobile communication business has heretofore operated satisfactorily under the freely competitive conditions which have characterized it." (P. A19, *infra*).[17]

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[16] The Commission agreed that no "certificate of convenience and necessity" was needed by the Telephone Company for the leasing and maintaining of private mobile radio systems. 55 Cal. P. U. C. at 394-396.

[17] The minority opinion quoted from *Chesapeake & Potomac Tel. Co.* v. *Manning*, 186 U. S. 238, 246-247 (1902), where this Court said that "an

The odd nature of the regulation bestowed on the Telephone Company is shown by its discriminatory dimension. The public utility status declared by the California Commission was confined *solely* to the Pacific Telephone and Telegraph Company. It did *not* extend to the numerous other enterprises, such as appellants, which carry on the identical business and compete for the same customers, often with the identical equipment that is leased by the Telephone Company to private users.[18]

While this Court ordinarily is loath to interfere with a state's regulatory experimentation, the Fourteenth Amendment sets *some* limit beyond which State action cannot go.[19] In the ascertainment of the "invidious discrimination" prohibited by the Equal Protection Clause, this Court recently advised that "Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Morey* v. *Doud*, 354 U. S. 457, 464 (1957). Here the Public Utilities Commission conferred its regulation on a single corporation at its own behest, without semblance of genuine public justification, enabling a telephone monopoly to

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arrangement of telephones by which parties in different rooms can communicate with each other; a system which is not connected with the general telephone exchange • • • is no more public in its nature than speaking tubes or call bells in a building."

[18] As per the opinion below, "[n]o jurisdiction over the petitioners or other competitors of Pacific in this field has been asserted by the Commission, and in its order it expressly disclaims any intention to assert such jurisdiction until there should be evidence that they had dedicated or were willing to dedicate their service to the public." (P. A9, *infra*).

[19] Compare *Morey* v. *Doud*, 354 U. S. 457 (1957); *Day-Brite Lighting* v. *Missouri*, 342 U. S. 421, 423 (1952); *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 488 (1955); *Safeway Stores, Inc.* v. *Oklahoma Retail Grocers Ass'n*, No. 252, O. T. 1958.

take over an industry where vigorously competing enterprises have long served the consumer.[20]

Whatever the residual force of the Due Process Clause to bar arbitrary action by States jeopardizing a person's economic survival,[21] it surely proscribes letters of marque, in the guise of public utility status, permitting a monopoly to prey on its independent competitors.

The decision below was thus appraised by a California observer:

> "What, then, is the net effect of this decision? Pacific, protected by the state against destructive competition, has become a giant in the field of telephone communication. Because of its size and the wide scope of its facilities, it is now in a position to preempt the field of lease-maintenance of radio equipment to individual users for private purposes. * * * It may well be that the *Commercial Communications* case has created conditions conducive to the growth of an undesirable monopoly in this field. If this is the practical result, the state is in the anomalous position of creating the very thing which public utility regulation was originally established to control." Comment, *Utilities, The State, and the Public Interest*, 10 Hastings L. J. 176, 187 (1958).

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[20] Though its rationale is obscure, the Commission placed great store in the Telephone Company's purported "dedication to the public" of its property and service. 55 Cal. P. U. C. at 393-5. Inasmuch as private competitors in this field bid for the same customers on the same basis as the Telephone Company, a firm's "dedication" is here but a legal truism devoid of factual significance other than a yen for the cloak of regulation. The Commission also cited a previous administrative ruling, not contested by the Telephone Company, which held that a sale and lease-back deal whereby the Telephone Company took over another company's private radio system was subject to PUC jurisdiction. 54 Cal. P. U. C. 71 (1955).

[21] Cf. *Schware* v. *Board of Examiners*, 353 U. S. 232, 238 *et seq.* (1957).

Whether the Due Process and Equal Protection Clauses of the Fourteenth Amendment tolerate discriminatory business regulation imposed for the sake of private monopoly rather than the protection of the public is a substantial issue deserving review by this Court. The numerous precedents which sustain State regulatory action do not consider, let alone approve, such self-serving regulation sought by a monopoly.

CONCLUSION

For the above reasons, appellants submit that the divided decision of the Supreme Court of the State of California poses federal questions of national importance which warrant plenary resolution by this Court.

Respectfully submitted,

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February 21, 1959.

APPENDIX A

The majority and dissenting opinions of the Supreme Court of California, reported at 50 Cal. 2d 512; 327 P. 2d 513, and the order denying rehearing are as follows:

IN THE SUPREME COURT OF THE STATE OF CALIFORIA

Copy filed June 27, 1958. WILLIAM I. SULLIVAN, Clerk. By ——, ——, S. F. Deputy.

IN BANK

S. F. 19722

COMMERCIAL COMMUNICATIONS, INC. (a corporation), ET AL., PETITIONERS,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, RESPONDENT.

S. F. 19723

WATSON COMMUNICATIONS SYSTEMS, INC. (a corporation), ET AL., PETITIONERS,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, RESPONDENT.

S. F. 19725

THE CITY OF LOS ANGELES, A Municipal Corporation, PETITIONER,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, RESPONDENT.

1

SEE DISSENTING OPINION

This is a consolidated proceeding to review an order of the Public Utilities Commission accepting, with modifications and directions, tariff schedule No. 108-T filed by Pacific Telephone and Telegraph Company, hereinafter called Pacific. The schedule was voluntarily filed and covered the installing, leasing and maintaining of private mobile communications systems. The tariff was originally

accepted to become effective April 30, 1956, but at the request of petitioners a rehearing was granted and the commission conducted an investigation into the proposed rates and conditions and an inquiry as to the scope of its own jurisdiction. The petitioners, with the exception of the City of Los Angeles, are private persons or firms engaged in furnishing similar service on a private contract basis, in competition with Pacific, which heretofore has offered this service only on a contract basis. The City of Los Angeles has appeared on behalf of customer interests of its own and its inhabitants, and pursuant to its public-spirited interest in utility regulation and growth. The petitioners [1] urge that the commission has incorrectly determined in favor of its own jurisdiction in this matter and contend that their rights under the Constitution of the United States and of this state are violated. They also urge that the tariff creates a conflict with federal law and with the provisions of a consent decree [2] to which Pacific, as a subsidiary of American Telephone and Telegraph Company, was a party.

As a basis for its order the commission found and concluded: 1. That Pacific is a telephone corporation and public utility in the performance of this service; 2. That the private mobile communication systems and service heretofore furnished under contract by Pacific and proposed in this tariff schedule constitute a telephone line and public utility telephone service, under the provisions of the Constitution and the Public Utilities Code, and that Pacific has dedicated the same to the public; 3. That the equipment so used is necessary or useful in Pacific's performance of its duties to the public and the leasing thereof is subject to commission jurisdiction as provided in section 851 of the

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[1] Petitioner Thomas Poor, an individual doing business as Bakersfield Electronics, appears as one of the petitioners on the Watson Communication Systems, Inc. brief. He did not petition for a rehearing before the commission, and therefore has no standing before this court as a petitioner for review. (Pub. Util. Code, § 1731.)

Petitioner Gamewell Company did not petition for rehearing and likewise has no standing to petition for review. This court gave it permission to file a brief, without opposition from the commission until after the brief was filed. It is not necessary to rule on the commission's motion to strike this brief as it may be treated as an amicus curiae brief.

Amici curiae briefs have also been filed by several interested parties.

[2] *United States of America* v. *Western Elec. Co., Inc.* and *American T. & T. Co. et al.*, Civil Action No. 17-49, U.S.D.C.

Public Utilities Code[3]; 4. That the commission under sections 455, 728 and 729 has the power to establish rates for these systems in lieu of contracts; 5. That the commission under section 455 has the power to accept, alter or permanently suspend the proposed rates or to establish other rates which it finds to be just and reasonable; 6. That the proposed rates, with the revisions and supplementations ordered are just and reasonable.

Pacific is a private corporation engaged in the public utility telephone business within this state. As such its services, property and charges are subject to the recognized supervision of the commission. However, under its charter Pacific may also engage in activities of a nonutility nature. Whether these activities unduly interfere with or hamper it in the performance of its public utility obligations or affect property owned by it which is necessary or useful in the performance of its obligations to the public, are of course, generally, questions within the cognizance of the commission (§§ 701, 702, 851). It is sometimes a question of mixed law and fact as to whether a particular activity is within the regulatory scope of the commission. Here we must look to the nature of the activity furnished under this tariff schedule as well as the question of dedication, to determine the jurisdictional issues presented.

Private mobile communication systems, as the name implies, afford direct oral communication with persons in moving vehicles. Tariff 108-T defines "private mobile communication systems" as "one or more land stations, and one or more mobile stations, or two or more mobile stations, together with associated equipment, for radiotelephone communication between land and mobile stations or between mobile stations." It defines a land station as an "operational fixed radiotelephone station used with a private mobile communication system as a base station" or as a repeater, control or relay station. A mobile station is comprised of "a transmitter, a receiver (with loudspeaker), a push-to-talk handset or microphone, and an antenna." Because it involves the use of radio, there must be compliance with the requirements of the Federal Communications Commission and the provisions of the Federal Communications Act (Comm. Act of 1934, 48 Stat. 1064, 47 U.S.C.,

[3] Unless otherwise indicated all references hereafter are to the Public Utilities Code.

§ 151 *et seq.*, as amended). The person, firm or corporation desiring to have a private mobile communication system must apply to the federal commission for allocation of a radio wave length and for permission to operate the required equipment. The conditions for a license vary with the purpose for which the use is desired, and the system is licensed to be operated for that specific use only. The equipment may be manufactured, purchased or leased by the licensee but he must satisfy the commission that it meets its operating requirements. He may install, maintain and repair the equipment himself or he may delegate these duties but he must remain in control of the equipment. He is subject to punishment by the federal commission for violation of its regulations. The tariff of Pacific complies with the regulations of the federal commission.

Private mobile communication systems differ in some respects from public mobile communication systems. Pacific, as a common carrier telephone company, is licensed by the federal commission to operate public systems over the radio frequencies allocated for this public use. It may install radiotelephone equipment in the vehicle of a subscriber for this use, but all calls must be completed through the company's central office, with the intervention of a company operator to ask for the number and to make the connection. Calls in any number may be made on the company's exchange system throughout the world. This service obviously can only be furnished by a public utility telephone company. It is appropriate and effective for persons needing only occasional communication to or from their vehicles with their offices. It has been furnished by Pacific under tariffs filed with the state commission for the past decade.

Private mobile communication service fulfills a more specialized need. Where a continuously free channel is required, it is more efficacious. After the close of World War II and the Korean conflict government, industry and many organizations began to make extensive use of this type of service for quick, private communication with employees or agents in trucks and automobiles, and there is an ever increasing demand for the service. It is probably most widely known in connection with its use by law enforcement officers and taxicab companies. Pacific entered the field of furnishing private mobile systems in 1948 with two contract customers. In 1954 it was required by the state commission to file copies of its contracts. Subsequently (Order 51446,

Re Southern Counties Gas Co., 54 Cal. P.U.C. 75) the commission held that this service would become a public utility service but that there was not then sufficient experience to warrant the filing of tariffs, that this was still an experimental venture and that it might be a disservice to Pacific's telephone rate-payers to require it at that time to file tariffs and to offer this service to all comers. This decision was not challenged. When Pacific filed tariff schedule 108-T in 1956 it had 214 contract customers, covering 1702 private mobile units, and had 225 inquiries on hand for private systems. The 214 contracts represented only 4.5% of the total private mobile base stations then licensed in this state.

The petitioners urge that in furnishing these private systems on a lease-maintenance basis Pacific is merely engaging in an equipment service, not a "telephone service" and they stress the importance of the following differences between public and private systems: that the private systems have no tie-in or interconnection with the general toll and switching facilities of Pacific; that Pacific cannot furnish the radio channel or the license to operate the equipment but these must be secured by the user; that the user must remain in control of the equipment; that he remains responsible to the federal commission; that the equipment and maintenance may be obtained from many private sources, whereas public mobile communications may be obtained only from a public utility telephone company; that the power for energizing the sending apparatus may be obtained from other sources than a telephone company; that for the operation of the private systems there is no dependence upon rights or monopoly, eminent domain or franchise; that Pacific is merely leasing inert radio equipment; that this service is not available to all of the public, and does not come within the common understanding of a telephone system offering.

Article XII, section 23, of our Constitution provides: "Every private corporation . . . *owning*, managing, *or* controlling any . . . plant, or equipment, *or any part of such . . . plant or equipment within this State . . . for the transmission of telephone . . . messages . . . either directly or indirectly, to or for the public . . . is hereby declared to be a public utility* . . . and every class of private corporations . . . hereafter declared by the Legislature to be public utilities shall likewise be subject to such control and regulation.

The . . . Commission shall have . . . such power and jurisdiction to supervise and regulate public utilities . . . and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the Legislature. . . ." (Emphasis added.) In the Public Utilities Code the Legislature has further defined "public utility" as including "every . . . telephone corporation . . . where the service is performed for or the commodity delivered to the public or any portion thereof" (§ 216, subd. (a)) and has provided that "Whenever any . . . telephone corporation . . . performs a service or delivers a commodity to the public or any portion thereof for which any compensation or payment whatsoever is received, such . . . telephone corporation . . . is a public utility subject to the jurisdiction, control and regulation of the commission and the provisions of this part." (§ 216, subd. (b)) "Telephone corporation" is defined as including "every corporation or person owning, controlling, operating, *or managing any telephone line for compensation* within this State" (§ 234); and "telephone line" is defined as including "all . . . property *owned*, controlled, operated, *or managed in connection with or to facilitate communication by telephone, whether such communication is had with or without the use of transmission wires.*" (§ 233.) (Emphasis added.)

It is readily apparent that by the use of the disjunctive it was intended that *ownership* of any plant or equipment would be sufficient and that operation and control were not made prerequisites to commission jurisdiction; furthermore that such ownership may be of "any part" of such plant or equipment. It is therefore immaterial that Pacific does not remain in control of the equipment or that it does not furnish the radio channel over which the equipment is operated. These are matters of limitation imposed by the federal commission. The requirement that there be no interconnection with the general toll and switching facilities of Pacific is also imposed by the federal commission and acquiesced in by Pacific, although such connection is physically possible and, in stated cases of public emergency, is permissible.

The fact that private mobile communication systems may be obtained from sources other than a public utility, does not detract from the utility nature of this service which is offered to the public under a voluntarily filed tariff. Regu-

lated and nonregulated services compete in many fields[4] and there is no requirement in our Constitution or laws that telephone service may be offered only by a monopoly. In some of its phases a telephone company, dedicated to the public service, does tend to become a monopoly (*Cal. Fire Proof Storage Co.* v. *Brundage*, 199 Cal. 185, 189). Were this not so, severe annoyance and economic waste might be caused if telephone users were obliged to subscribe to many competing companies, with duplicate instruments on their desks, and with transmission wires invading the skies or radio telephony cluttering the frequency channels, in order to obtain complete telephone service.

The real issue presented is whether the service offered by the proposed tariff is "for the transmission of telephone messages" or "in connection with and to facilitate communication by telephone."

The word "telephone" is not defined in the code. In its narrow sense "telephone" refers to the instrument by which telephony is achieved. It is defined in Webster's New International Dictionary, 2d edition as "An instrument for reproducing sounds, especially articulate speech, at a distance." In defining "telephony" the Encyclopaedia Britannica (1954 ed.) states "In a broad sense the term telephone or telephony includes the entire art of speech transmission with the many accessories and operating methods which research, development and invention have supplied to facilitate and extend conversation at a distance by electrical means." As this court pointed out in *Television Transmission* v. *Public Utilities Commission*, 47 Cal. 2d 82, 88, in telephony "one may carry on a two-way communication by speaking as well as by listening" and it is distinguishable from radio broadcasting in that the latter "is usually associated with music halls, theaters and newspapers." While mobile communication involves an application of the art of radio to telephone communication, it is more akin to telephony than to radio broadcasting.

In determining whether Pacific is here offering a telephone service, it appears to be basic that what a telephone

[4] *Story* v. *Richardson*, 186 Cal. 162 (sale of excess electrical energy by a private person); *Sou. Calif. Edison Co.* v. *R. Com.*, 194 Cal. 757 (sale of surplus water by a private person); *Market St. Ry. Co.* v. *R. Com.*, 24 Cal. 2d 378, aff'd 324 U.S. 548 (competing transit service by a municipal utility and a commission-regulated utility); *Samuelson* v. *Pub. Util. Com.*, 36 Cal. 2d 722 (competing highway contract carriers and highway common carriers).

company actually provides and maintains is the facilities for the transmission of telephone messages, or for communication by telephone. In its earliest beginnings this transmission was over a single iron wire connecting two telephone instruments with ground return circuits. It was over such a wire that Alexander Graham Bell called to his startled assistant, "Mr. Watson, come here, I want you." That was in March 1876. Many technological improvements in the art of telephony have since been made, including radiotelephony and the instruments used for carrying on conversations at distances greater than the human voice naturally carries. The exact form or shape of the transmitter and the receiver or the medium over which the communication can be effected is not prescribed by law. In common understanding the communication effected by private mobile systems would appear to be a telephone communication. Section 233 above quoted expressly recognizes that communication may be made without the use of transmission wires. Among the other uses of radio is the transmission of telephone messages without the use of wires. We are informed that today ordinary toll telephone service is furnished as much by radio as by land lines and that Pacific now operates about 350,000 toll circuit miles of microwave radio relay in California. It also uses radio for such diverse services as rural subscriber lines, coastal harbor service and highway service. All of these are treated as public telephone service under filed tariffs. Because of the physical nature of the medium here used (radio), the private nature of the communication contemplated and the restrictions established by the federal commission, private radio-telephone differs in some respects from public radiotelephone service and also from land line telephone service. Nevertheless it is a telephone service and if dedicated to public use it is subject to the jurisdiction of the respondent commission.

The commission found that Pacific has dedicated this service to the public. The fact that only a restricted portion thereof is eligible to apply for it is not determinative. It is offered to all of the public who may be eligible to apply for it. Dedication to a portion of the public will suffice. (§§ 216, 207[5]; *Camp Rincon Resort Co.* v. *Eshle-*

[5] Section 207: "'Public or any portion thereof' means the public generally, or any limited portion of the public, including a person, private corporation . . . for which the service is performed or to which the commodity is delivered."

man, 172 Cal. 561). This service is within a class recognized by the Constitution and the Legislature as a public utility. The cases cited by petitioners in which dedication constituted the main problem do not present any difficulty.

No jurisdiction over the petitioners or other competitors of Pacific in this field has been asserted by the commission, and in its order it expressly disclaims any intention to assert such jurisdiction until there should be evidence that they had dedicated or were willing to dedicate their service to the public. Until the commission attempts regulation of these petitioners, they have no occasion to complain that they are denied due process of law by the commission's acceptance of Pacific's tariff. (*Stephenson* v. *Binford*, 287 U.S. 251, 277; *Continental Baking Co.* v. *Woodring*, 286 U.S. 352, 367-369; *Hicklin* v. *Coney*, 290 U.S. 169, 172-173.)

Nor are the petitioners denied equal protection of the law by the fact that a regulated company competes with them in this service. The commission found as a fact that there was no unfair competition by Pacific in this field, and ruled that it would not allow Pacific to give its private mobile customers service which it would not make available to the customers of its competitors and that it would require Pacific to maintain charges which would be fully compensatory. The rates prescribed by the tariff were found, with the modifications ordered, to be fair and reasonable, and as to this the conclusion of the commission on the record presented is binding upon this court.

There is no sound basis for the contention that the regulation of this service is outside the permissible sphere of government regulation and that it contravenes the 14th Amendment. There are several respects in which the private mobile communication systems are of public concern. The evidence shows that these systems are for a considerable part used by public transportation companies, trucking companies, law enforcement agencies, fire departments, and utility companies such as irrigation and water companies. Their purpose is the maintaining of communication with vehicles moving on the public streets and highways. The medium used is radio and is generally of public concern. ". . . (W)here the control is for the public good any industry may be regulated, provided there is 'adequate reason' for it. That 'adequate reason' can only be to achieve a purpose within the police power of

the state." (*State Board* v. *Thrift-D-Lux Cleaners*, 40 Cal. 2d 436, 443). The jurisdiction exerted by the commission over this tariff offering goes merely to the regulation of the telephone service offered by a public utility, a matter concededly within the police power of the state and the powers given to the commission by the Constitution and the Legislature.

Also in support of its jurisdiction the commission found that the private mobile communication equipment is necessary or useful in Pacific's performance of its duties to the public and the leasing thereof is subject to its jurisdiction, as provided in section 851;[6] that under sections 455, 728 and 729[7] it has the power to establish rates for these systems in lieu of contracts; and that under section 455 it has the power to accept, alter or permanently suspend the proposed rates or to establish other rates which it finds to be just and reasonable. These findings may not be disregarded.

It is well established that the powers of regulation conferred upon the commission by the Legislature must be cognate and germane to the regulation of public utilities. (*Pac. Tel. & Tel. Co.* v. *Eshleman*, 166 Cal. 640; *Morel* v. *R. Com.*, 11 Cal. 2d 488, 492.) When these powers relate to telephone companies they must be cognate and germane to the regulation of public utility telephone companies. In this instance the exercise of jurisdiction over this service would seem to be reasonably within the powers so granted to the commission. Its authority to regulate the rates charged by Pacific for this lease-maintenance service sufficiently appears in section 210,[8] 489[9] and 701.[10]

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[6] Section 851. "No public utility shall sell, lease . . . any part of its . . . plant . . . or other property necessary or useful in the performance of its duties to the public . . . without first having secured from the commission an order authorizing it so to do. . . ."

[7] Sections 455, 728 and 729 set forth the procedure whereby the commission may investigate the propriety and reasonableness of rates contained in tariffs lawfully filed, and establish new rates.

[8] Section 210: " 'Rates' includes rates, fares, tolls, rentals, and charges, unless the context indicates otherwise."

[9] Section 489: "Under such rules as the commission prescribes, every public utility other than a common carrier shall file . . schedules showing all rates, tolls, rentals, charges . . . together with all . . . contracts . . . which in any manner affect or relate to rates, tolls, rentals, classifications or service. . . ."

[10] Section 701: "The commission may supervise and regulate every

This leaves for consideration the question of any probable conflict between the jurisdiction of the federal and state commissions and of an alleged limitation on the state commission by reason of the provisions of the New Jersey consent decree hereinbefore referred to.

The respondent commission held that the provisions of section 2, subdivision (b) [11] and section 3, subdivision (e) [12] of the Communications Act of 1934 as amended (47 U.S.C., §§ 152, 153) make it clear that the federal commission has no jurisdiction, except under the radio licensing provisions of the act, over intrastate communication service by radio, and that "intrastate communication by radio" does not include communication between points in the same state if such communication is regulated by a state commission. The proposed tariff applies only to service within this state. The commission's ruling would appear to be correct. It is noted that the Federal Communications Commission has not asserted jurisdiction over such tariffs or rates.

In January 1956 the Department of Justice brought a proceeding under the Sherman Act in the United States District Court in New Jersey against Western Electric Company, Inc. and American Telephone and Telegraph Company. By consent of the parties and without trial of the issues a consent decree was entered. Under the federal antitrust laws where no trial is had and no testimony taken, a consent decree is not evidence of or an admission of any of the charges contained in the complaint. (15 U.S.C. 16; *Barnsall Refining Corp.* v. *Birnamwood Oil Co.* (E.D. Wis. 1940) 32 F. Supp. 308, 310-311.)

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public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."

[11] Section 2, subdivision (b) (47 U.S.C. 152, subdivision (b)) which provides in part as follows: "Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier. . . ."

[12] Section 3, subdivision (e) (47 U.S.C. 153, subdivision (e)), which provides: "'Interstate communication' . . . means communication . . . (1) from any State . . . to any other State . . . but shall not, with respect to the provisions of subchapter II of this chapter, include wire or radio communication between points in the same State . . . if such communication is regulated by a State commission."

(Note: Subchapter II is entitled "Common Carriers.")

The New Jersey court specifically retained continuing jurisdiction to issue orders and directions with reference to the construction or enforcement of this final judgment. From the briefs submitted in the proceeding before this court it appears that the original parties to the New Jersey proceeding take opposing views as to the meaning and effect of subdivision (d) of section V of that decree which provides as follows:

"The defendant AT&T is enjoined and restrained from engaging, either directly, or indirectly through its subsidiaries . . . in any business other than the furnishing of common carrier communications services; provided, however, that this Section V shall not apply . . . (d) for a period of five (5) years from the date of this Final Judgment, leasing and maintaining facilities for private communications systems, the charges for which are not subject to public regulation, to persons who are lessees from defendants or their subsidiaries of such systems forty-five (45) days after the date of this Final Judgment. . . ."

The Department of Justice takes the view that under subdivision (d) the defendants in that action were prohibited from engaging in the business of leasing and maintaining facilities for private mobile communications systems, but were allowed a cut-off period of five years for serving those who were lessees within 45 days after the date of the judgment. Its view is that the phrase in subdivision (d) reading "the charges for which are not subject to public regulation" is descriptive of the fact stated, namely, that such charges *are not subject to public regulation.* The other parties to the consent decree are of the view that this phrase merely provides that if the charges are regulated by a state commission the telephone companies are not prohibited by the decree from continuing to furnish equipment and facilities for private mobile communications systems. Pacific, as hereinabove stated, was a party to that decree and would be bound by its terms.

Insofar as we are advised no ruling has been obtained from the New Jersey federal court as to the meaning and effect of subdivision (d) of section V, and no adjudication of this issue has been made by the Federal Communications Commission. However, it has been brought to our attention that in a Memorandum Opinion and Order released November 21, 1957, in the proceedings entitled "In the Matter of American Telephone and Telegraph Company, *et al.*, Lease and maintenance of equipment and facilities

for private communication systems, Docket No. 11972," in which this issue was sought to be raised, the federal commission stated it had been unable to find any basis in the specific language of the consent decree to support the contention of the Department of Justice that it was the intent of that decree to prohibit the service, regulated or unregulated. That commission made no actual determination on this question.

In the proceedings before the state commission some of the petitioners argued that Pacific's motive in filing the proposed tariff 108-T was to avoid the consent decree. The commission held that there was no proof to that effect; that it would not take judicial notice of good or bad intentions; that if the federal court wished to bar such activities by Pacific even though subject to regulation, it would have made such a provision, and that there was nothing in the decree to prompt it to change its ruling that this service was utility service subject to its jurisdiction. No good reason appears why the decision of the commission in this respect should be disturbed.

The order is affirmed.

SHENK, J.

We Concur:

GIBSON, C. J.
TRAYNOR, J.
SPENCE, J.

S. F. 19722

COMMERCIAL COMMUNICATIONS, INC.,

v.

P. U. C.

S. F. 19723

WATSON COMMUNICATIONS SYSTEMS, INC.,

v.

P. U. C.

S. F. 19725

THE CITY OF LOS ANGELES,

v.

P. U. C.

DISSENTING OPINION OF SCHAUER, J. TO OPINION BY SHENK, J.

If we follow established law, or even the fundamental principles of our governmental plan, we should hold that the Public Utilities Commission is without jurisdiction in this matter because it clearly appears that the private mobile radiotelephone operations of the Pacific Telephone Company are not public utility operations. Pacific, by its purported dedication of its private mobile radiotelephone equipment and maintenance service and its filing of a tariff schedule, cannot impart the character of a true public utility into that which is essentially a highly competitive private enterprise. The action of the commission, in the premises, gives official approval to the unwarranted invasion of a free market by the entering wedge of what appears to be a design for eventual monopolistic sequestration of the field. This public utility company should not be allowed to convert the furnishing of equipment and maintenance service for private communications into an operation under control of the Public Utilities Commission.

The conditions of the furnishing of equipment and facilities by Pacific are described as follows in Schedule 108-T, filed by Pacific with the Public Utilities Commission. The

lessee-licensee is "responsible for securing from the Federal Communications Commission the necessary authorizations for the communications system and the operating personnel as may be required in accordance with the Rules and Regulations of the Federal Communications Commission."

"The station licensee shall have exclusive control of the communication facilities furnished to such licensee and full responsibility for their use and operation in accordance with the station authorization and the Rules and Regulations of the Federal Communications Commission.

"The station licensee shall have unlimited right of ingress to and egress from any premises of the Telephone Company on which is located land radio station equipment furnished to each licensee under this schedule, and the licensee shall have unrestricted access to such equipment."

The lessee must provide and maintain an adequate power supply for each mobile station and, unless the land station is located on premises of Pacific, must provide and maintain an adequate power supply for the land station.

Pacific undertakes only to furnish, install, and maintain the facilities for communication.

The foregoing description by Pacific of the private mobile communication operation shows that the operation is essentially a private business, not a public utility service. The lessee, not Pacific, must secure the requisite authorization for radio operation from the Federal Communications Commission. The lessee has full responsibility for the operation and exclusive control over the communication facilities. The lessee provides the power for operation of the station (except in the few and entirely distinct situations of land stations on telephone company property). Thus it is the lessee who operates and controls the communication service; Pacific merely invades the field of private enterprise to furnish and maintain equipment necessary or convenient to the carrying on of the private communications.

There is nothing in the nature of the private mobile communications business which contemplates that the supplier of the communications equipment retain an interest in it, as Pacific does; most private manufacturers of such equipment sell the equipment to those who operate it. The many thousand of such privately owned items of equipment

installed and maintained in aircraft are subject to regulations of both the Federal Communications Commission and the Civil Aeronautics Administration. To what extent the Public Utilities Commission of California expects to overlap the jurisdiction of the federal regulatory bodies is not precisely defined.

According to the majority's construction of the applicable provisions of the state Constitution [1] and the Public Utilities Code,[2] the Constitution has authorized the Legislature to provide, and the Legislature has provided, that any service in connection with any telephonic communication, public or private, is a public utility service subject to the jurisdiction of the Public Utilities Commission if it

[1] Cal. Const., art. XII, Sec. 23: "Every corporation . . . owning . . . equipment . . . for the transmission of telephone . . . messages . . ., either directly or indirectly, to or for the public . . . is hereby declared to be a public utility subject to such control and regulation by the . . . Commission as may be provided by the Legislature. . . . The . . . Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the Legislature, and every class of private corporations, individuals, or associations of individuals hereafter declared by the Legislature to be public utilities shall likewise be subject to such control and regulation. . . ."

[2] Pub. Util. Code, Sec. 216: "(a) 'Public utility' includes every . . . telephone corporation . . . where the service is performed for or the commodity delivered to the public or any portion thereof.

"(b) Whenever any . . . telephone corporation . . . performs a service or delivers a commodity to the public or any portion thereof for which any compensation or payment whatsoever is received, such . . . telephone corporation . . . is a public utility subject to the jurisdiction, control and regulation of the commission. . . ."

Pub. Util. Code, Sec. 207: " 'Public or any portion thereof' means the public generally, or any limited portion of the public, including a person, (or) private corporation . . . for which the service is performed or to which the commodity is delivered."

Pub. Util. Code, Sec. 233: " 'Telephone line' includes all conduits, ducts, poles, wires, cables, instruments, and appliances, and all other real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate communication by telephone, whether such communication is had with or without the use of transmission wires."

Pub. Util. Code, Sec. 234: " 'Telephone corporation' includes every corporation or person owning, controlling, operating, or managing any telephone line for compensation within this State."

is offered to the public or any portion thereof. But the Constitution should not lightly be understood as authorizing the Legislature to convert private business into a public utility and the legislation enacted pursuant to the Constitution should not be understood as intended so to do.

Private mobile radiotelephone communication systems are analogous to private inter-office or intra-building communication systems. Concerning the latter type of communication system the following language and holding of *Chesapeake & Potomac Tel. Co.* v. *Manning* (1902), 186 U.S. 238, 246-247, are pertinent: "it cannot be presumed that a legislature intends any interference with purely private business. It cannot ordinarily prescribe what an individual or corporation, engaged in a purely private business, shall charge for services, and, therefore, although the language of a statute may be broad enough to include such private business, it will generally be excepted therefrom in order to remove all doubts of the validity of the legislation. It appears that some portion of the defendant's business is of a purely private nature, the receipts whereof are spoken of in its reports as private rentals, and as to such business Congress could not, if it would, prescribe what shall be charged therefor. In many buildings, both those belonging to the government of the District (of Columbia), and those belonging to private individuals, is what may be called a local telephone plant; that is, an arrangement of telephones by which parties in different rooms can communicate with each other: a system which is not connected with the general telephone exchange, and is no more public in its nature than the speaking tubes or call bells in a building. It is only for the personal use of parties in the building. By it those in the building cannot communicate with the general public, nor can such public reach parties in the building. It is simply a local convenience for the use solely of those who are in the building. Such combinations of telephone instruments in a single building, with no outside connections, are furnished by the defendant, and the rentals therefrom, as well as the expenses thereof, are entered in its books of account, and constitute a part of its business." The described system, it is held, was not subject to rate regulation by Congress. (See also *City of St. Paul* v. *Tri-State Telephone & Telegraph Co.* (1935), 193 Minn. 484 (284 N.W. 822) (telephone systems, separate from the general public telephone system,

for city's fire and police departments are "a private use").)

Contrary to the majority opinion (p. 16 of ditto) it has been held that the fact that a private telephone system may be used by a governmental unit for governmental purposes does not make the system a public utility subject to regulation as such. (*Chesapeake & Potomac Tel. Co.* v. *Manning* (1902), *supra*, 186 U.S. 238, 247; *City of St. Paul* v. *Tri-State Telephone & Telegraph Co.* (1935), *supra*, 193 Minn. 484, 486 (258 N.W. 822, 824).)

The fact that equipment for private mobile communications systems is furnished and maintained by a public utility corporation which also furnishes public utility facilities and service, does not mean that the corporation, as to the private service, can be compelled to file a tariff with the Public Utilities Commission or is entitled to have a tariff accepted by the commission. "The mere fact that such telephones are furnished by the company, which also does a public business, does not make them a part of such public business, or subject them to the regulation by Congress of its charges. A railroad company may, if authorized by its charter, carry on not simply its strictly railroad business, but also an establishment for the manufacture of cars and locomotives. The fact that it is engaged in these two different works would not in itself subject the manufacture of cars and locomotives to the supervision of the legislature, although such body would have the right to regulate the charges for railroad transportation." (*Chesapeake & Potomac Tel. Co.* v. *Manning* (1902), *supra*, 186 U.S. 238, 247; see *Allen* v. *Railroad Commission* (1918), 179 Cal. 68, 82.)

The fact that Pacific has offered, by filing Schedule 108-T, to submit to the jurisdiction of the commission and to furnish communication equipment on a lease and maintenance basis without discrimination to persons authorized by the Federal Communications Commission to operate private mobile communications systems, cannot convert an essentially private business operation into a public utility offering. (See *Allen* v. *Railroad Commission* (1918), *supra*, 179 Cal. 68, 82.)

The opinion of the commission states, "We are not convinced that Pacific's presence in the field will constitute any threat to the continued vigor of its competitors. It should not, does not propose to, and will not be allowed to favor

its own private mobile customers by way of connections with its 'land lines' not allowed to the customers of its competitors. It will be required to maintain charges which are fully compensatory. It will be under the disadvantage of being unable to enter into price competition with its competitors to secure the business of particularly desirable customers; and it will be required to serve customers its competitors may not elect to serve. . . .

"The Commission finds that competition of regulated companies with the nonregulated, if it is unfair at all, is more likely to be unfair to the regulated rather than to the nonregulated competitors. . . . (I)n the Commission's opinion, the public has less to fear from the activities of a 'monopoly' when such 'monopoly' is fully regulated by public authorities and we fail to find that Pacific will be in a position to compete unfairly with its smaller rivals."

These determinations of the commission ignore the realities of the situation. Pacific, a public utility corporation, obviously is looking toward expanding the area of its operations into a field now serviced by private enterprise. Surely the commission is not presuming that Pacific is altruistic in filing schedules for its activities in this field. And certainly Pacific has the right to seek expansion, diversification, and increased profits—but not by the process of bringing disparate segments of private enterprise into its monopolistic domain. Of course it is true that Pacific currently, under free enterprise conditions, is far from having a monopoly in this field. But manifestly it is working toward elimination of the competition of private persons and firms in the newly invaded field of private mobile communication service. The result of the majority decision upholding the order of the commission will be a tendency to promote monopoly in a field of business operation which is and should remain in the realm of free enterprise. The decision of the majority places the stamp of approval upon bureaucratic recognition, as well as control, of Pacific in a type of business which has not been shown to require regulation as a monopoly. The private mobile communication business has heretofore operated satisfactorily under the freely competitive conditions which have characterized it. Understandably the petitioners engaged in this business in the open market of free enterprise object to commission action which amounts to bureaucratic sponsorship of a

public utility corporation operating as a public utility in this field.

The following discussion in *General Alarm* v. *Underdown* (1953), 76 Ariz. 235 (262 P. 2d 671, 672-673 (1-3)), concerning a telephonic and telegraphic burglary, fire, and emergency alarm system is apropos: "To be a public service corporation, its business and activities must be such as to make its rates, charges, and methods of operation a matter of public concern. It must be, as the courts express it, clothed with a public interest to the extent clearly contemplated by the law which subject it to governmental control. Free enterprise and competition is the general rule. Governmental control and legalized monopolies are the exception and are authorized under our constitution only for that class of business that might be characterized as a public service enterprise. The theory is that the right to public regulation and protection outweighs the customary right of competition. If the public contact with a business is such that its necessities and convenience can be better served through govermental supervision and controlled monopoly, thereby eliminating customary competition, the state may exercise its police power to that end. Such invasion of private right cannot be allowed by implication or strained construction. It was never contemplated that the definition of public service corporations as defined by our constitution be so elastic as to fan out and include businesses in which the public might be incidentally interested or businesses that might incidentally transmit messages in furtherance of the main object of the enterprise that otherwise could not be so characterized. The public has some interest in all business establishments but that interest must be of such a nature that competition might lead to abuses detrimental to the public interest. The public interest contemplated depends on the nature of the business, the means by which it touches the public, and the abuses which may reasonably be anticipated if not controlled. *Chas. Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U.S. 522, 43 S.Ct. 630, 67 L.Ed. 1103, 27 A.L.R. 1280. Our constitution must and easily can be interpreted in harmony with these principles. So construed, it is only in the interest of the convenience and necessity of the public, of the nature and to the degree herein stated, that a business may be supervised and controlled, rates fixed or monopolies granted."

With reference to the provision of the 1956 consent decree

of the United States District Court for the District of New Jersey in *United States* v. *Western Electric Co.*, quoted in the majority opinion, pp. 20-21,[3] I would comment as follows: This provision is not a clear declaration that the charges for leasing and maintaining private communications systems are not subject to public regulation; neither is it a clear declaration that American Telephone and Telegraph Company and its subsidiaries are not enjoined from engaging in the business of leasing and maintaining facilities for private communications systems where the charges for those private communications services are subject to public regulation. In the circumstances it does not appear that the provision of the consent decree should influence the decision herein.

For the reasons above stated I would annul the order of the Public Utilities Commission.

We concur:

CARTER, J.
McCOMB, J.

SCHAUER, J.

[3] "The defendant AT&T is enjoined and restrained from engaging, either directly, or indirectly through its subsidiaries . . . in any business other than the furnishing of common carrier communications services; provided, however, that this Section V shall not apply . . . (d) for a period of five (5) years from the date of this Final Judgment, leasing and maintaining facilities for private communications systems, the charges for which are not subject to public regulation, to persons who are lessees from defendants or their subsidiaries of such systems forty-five (45) days after the date of this Final Judgment . . . "

Filed July 23, 1958. William Sullivan, Clerk. By R. J. Bell, S. F. Deputy.

ORDER DENYING REHEARING

S. F. No. 19722

S. F. No. 19723

S. F. No. 19725

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

COMMERCIAL COMMUNICATIONS, INC., ET AL.,

v.

PUBLIC UTILITIES COMMISSION

WATSON COMMUNICATION SYSTEMS, INC., ET AL.,

v.

PUBLIC UTILITIES COMMISSION

THE CITY OF LOS ANGELES

v.

PUBLIC UTILITIES COMMISSION

Petitioners' application for rehearing Denied.

Carter, J.—Schauer, J. & McComb, J. are of the opinion that the application should be granted.

[Certification]

GIBSON,
Chief Justice.

APPENDIX B

PERTINENT STATUTORY PROVISIONS

COMMUNICATIONS ACT OF 1934

Act of June 19, 1934, c. 652, 48 Stat. 1064, as amended

SECTION 2(b)

47 U.S.C. § 152(b)

Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico * * * *

SECTION 3(e)

47 U.S.C. § 153(e)

For the purposes of this chapter, unless the context otherwise requires—

(e) "Interstate communication" or "interstate transmission" means communication or transmission (1) from any State * * * to any other State * * * but shall not, with respect to the provisions of subchapter II of this chapter, include wire or radio communication between

points in the same State * * * through any place outside thereof, if such communication is regulated by a State commission.

SECTION 301

47 U.S.C. § 301

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio * * * (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State * * * except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

SECTION 313

47 U.S.C. § 313

All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. * * *

FILE COPY

Supreme Court, U.S.
FILED
MAR 20 1959
JAMES R. BROWNING, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1958

No. 719

COMMERCIAL COMMUNICATIONS, INC., et al.
and
WATSON COMMUNICATIONS SYSTEMS, INC., et al.,
Appellants,
vs.
PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA
and
PACIFIC TELEPHONE AND TELEGRAPH COMPANY,
Appellees.

MOTION TO DISMISS APPEAL.

RODERICK B. CASSIDY,
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In the Supreme Court
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PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA
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PACIFIC TELEPHONE AND TELEGRAPH COMPANY,
Appellees.

MOTION TO DISMISS APPEAL.

Comes now Public Utilities Commission of the State of California, one of appellees above-named, and moves this Court to dismiss for want of jurisdiction the appeal taken herein by appellants above-named upon the ground that the appeal does not present a substantial federal question.

I.

STATEMENT.

The subject matter under discussion is termed private mobile communications service. The word "private" means only that particular facilities are set aside for the exclusive use of a customer, and has no relation to the public utility status of the supplier. It affords direct oral communication with persons in moving vehicles between a fixed radiotelephone instrument and a vehicle equipped with a transmitter, a receiver, a push-to-talk handset or microphone, and an antenna. Communications may be from land stations to vehicles or between vehicles. Because it involves the use of radio, any person desiring to have such a system must apply to the Federal Communications Commission for allocation of a radio wave length and for permission to operate the required equipment. The licensee may purchase, manufacture or lease the equipment from any supplier. He may install, maintain and repair it himself or he may delegate such duties to anyone capable of performing them, but he must remain in control of it and meet the operational requirements of the Federal Communications Commission. The use of such systems is commonplace in the field of law enforcement and in the taxicab business. Appellee The Pacific Telephone and Telegraph Company first engaged in furnishing such systems to licensees of the Federal Communications Commission under lease-maintenance contracts in 1942. At that time it had two such contracts. The demand for the service grew, and appellee Commission in 1954 ordered it to file copies of such contracts with the Commission. A number of other firms were also engaged in lease-maintenance service during the same period.

On January 24, 1956, in the case of *United States of America v. Western Electric Company, Inc., and American Telephone and Telegraph Co.* (Civil Action No. 17-49, U.S.D.C., N.J.) which was a proceeding under the Sherman Act, a consent decree was issued. This provided that American Telephone and Telegraph Company was enjoined and restrained from engaging, either directly or through its subsidiaries (of which appellee Pacific is one) in any business other than the furnishing of common carrier communications services, except that the injunction should not apply, for a specified period, to the leasing and maintaining of facilities for private communications, the charges for which are not subject to public regulation, to persons who were then lessees. The phrase "the charges for which are not subject to public regulation" has been interpreted by the Department of Justice to mean that charges for private mobile service are not subject to public regulation. The other parties to the consent decree interpreted the phrase to mean that if the charges are regulated by a state commission the telephone companies are not prohibited by the decree from furnishing the necessary equipment and facilities. The Federal Communications Commission has not yet taken a stand on the matter.

Within a few weeks after the consent decree, appellee Pacific filed with the Commission the proposed tariff Schedule No. 108-T, which is part of the record certified to this Court. In so doing, it dedicated itself as a public utility thenceforth to provide for the public generally the common carrier communications service not prohibited by the consent decree—the service of installing, leasing and maintaining private communications systems wholly within the State of California, at the rates and charges and in

accordance with the rules set forth in the tariff. At that time, Pacific had 214 contract customers, covering 1702 private mobile units, and had 225 inquiries on hand for private systems. The 214 contracts represented but 4.5% of the total private mobile base stations then licensed in this State.

Appellants and others urged the suspension of the tariff. Public hearings were held; the decision of the Commission was rendered (*Pac. Tel. & Tel. Co.,* 55 Cal.PUC 387) lifting the suspension of the tariff upon certain conditions, among them the increasing of certain of the tariff rates to a compensatory level and the ordering of Pacific to augment its accounting records by keeping separate memoranda that would permit it to develop the complete cost of the service.

Petitions for rehearing were filed and denied; petitions for writ of review were filed and granted by the Supreme Court of the State of California. Thereafter said Court affirmed the Commission's decision. (*Commercial Communications, Inc., et al. v. PUC,* 50 Cal. 2d 512; 327 P. 2d 513; App. A.Juris.St. pp. A1-13.)

II.

QUESTIONS PRESENTED.

Appellants' statement of the questions presented on page 4 of their Jurisdictional Statement is very wide of the mark. The first "question"

> "(1) Whether a state agency can exempt a corporation from the prohibitions of a judicial decree of the United States enforcing the federal antitrust laws;"

assumes that there is such a judicial decree which is applicable to the decision appealed from, when in truth and in fact there is none.

The second "question"

> "(2) Whether the Communications Act's paramount federal policy of fostering competition in the development of radio over the public airways does not preclude individual states from imposing utility regulation on the private radio business;"

ignores the plain language of 47 USCA 152(b). This reserves to the states just such jurisdiction over intrastate communication service by wire or radio as was exercised by appellee Public Utilities Commission of the State of California. There can be no "paramount federal policy" in an area in which the Congress has expressly withheld jurisdiction from its federal agency.

The third "question"

> "(3) Whether the Due Process and Equal Protection clauses of the Fourteenth Amendment are not infringed by state utility controls sought by a telephone monopoly to take over markets served by numerous independent competitors."

presents a paradox. The appellants who are not and do not seek to come within "state utility controls" ask the Court to determine that they have been deprived of due process and equal protection because another has so conducted its business as to subject itself to such controls.

The only question properly before this Court is *whether the appeal presents a substantial federal question.*

III.

ARGUMENT.

1. THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Appellants state on pages 2-3 of their Jurisdictional Statement, "The jurisdiction of this Court is conferred by Title 28, United States Code, Section 1257(2)." That section provides that final judgments or decrees rendered by the highest court of a state may be reviewed by the Supreme Court

> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

It is worthy of note that appellants have not seen fit to comply with this Court's Rule 15(b)(v) requiring that when the validity of a state statute is involved, its text shall be set out verbatim.

The decision of appellee Commission (55 Cal.PUC 387 (1957)) determined the nature of the service offered by Pacific to be that of a common carrier communication service and also authorized rates therefor. Although rate-fixing may be legislative in nature the matter of rates was not before the California Supreme Court, nor is it before this Court. The jurisdictional aspect of the decision of appellee Commission is not, in legal effect, a statute within the meaning of 28 USCA 1257(2), but even if it were, it does not come within the purview of that statute.

Obviously it is not repugnant to any treaty. Two considerations only remain.

1. Is the decision repugnant to any law of the United States?

2. Is the decision repugnant to the Constitution of the United States?

Appellee Commission respectfully submits that the answer to both questions is in the negative, and that the appeal does not lie.

---

2. THE DECISION IS NOT REPUGNANT TO ANY LAW OF THE UNITED STATES.

On page 3 of its Jurisdictional Statement, appellants list the statutory provisions of federal laws which they claim are involved. These are excerpted on pages A-23 and 24 of Appendix B of the Jurisdictional Statement. Even the most cursory glance at those sections discloses that they do not apply to the instant proceeding.

47 USCA Section 152(b) clearly states that the Federal Communications Commission has no jurisdiction with respect to the charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier such as is here involved, subject to the provisions of Section 301 of said chapter. Section 153 defines interstate communications, which are not involved here. Section 301 affirms the control of the United States over all channels of interstate and foreign radio transmission, which is not here involved, and over intrastate transmission when the effects of such use extend beyond the borders of the state, or when use within a state causes

interference beyond its borders. Appellants do not assert, nor does the record show, nor is it a fact, that the effects of the California intrastate radio transmission service in the case at bar extend beyond the borders of California, nor that interference arising from its use in California has occurred beyond its borders.

Section 313 applies only to unlawful restraints and monopolies and combinations in restraint of trade in the manufacture, sale and trade of radio apparatus and devices entering into interstate or foreign commerce and communications.

Appellants advert (p. 4, Juris. St.) to the consent decree entered by the United States District Court for the District of New Jersey on January 24, 1956. While appellants do not claim that the consent decree is a law of the United States within the meaning of 28 USCA 1257(2), so as to confer jurisdiction on this Court, they urge that appellee Commission by the decision here appealed from exempted appellee Pacific Telephone & Telegraph Company from its prohibitions "enforcing the federal antitrust laws." (Idem.)

Pacific is a party to the consent decree and is bound by its terms, if such terms are applicable here. However, the rendering of the common carrier communications service to which Pacific has dedicated itself is not prohibited by the consent decree. As set forth in the Statement herein (p. 2) there is a dispute over the meaning of the effect of the expression which prohibits Pacific and other American Telephone & Telegraph Company subsidiaries from leasing and maintaining facilities for private communications systems, the charges for which are

not subject to public regulation. Appellee Commission found (55 Cal.PUC 387, 399):

> ". . . and the Consent Decree seems specifically to assume that such activities as the one here in contemplation can be rendered by applicant without any injurious effect on the public welfare, so long as such activities are regulated by state commissions. We believe that, if this is the implication of the Consent Decree, it is a fully justified position."

In its majority opinion the California Supreme Court commented (Juris.St.Appen.A pA-13) that the Federal Communications Commission had made no actual determination of the question. The dissenting opinion (pA-21) termed the provision "not a clear declaration", and said:

> "In the circumstances it does not appear that the provision of the consent decree should influence the decision herein."

As appears in footnote 6 (p. 8, Juris. St.) the Federal Communications Commission had not, as of January 8, 1959, assumed any position concerning the effects of the Consent Decree if the lease-maintenance service is found by any jurisdiction to be the furnishing of common carrier communications services and the charges therefor subject to public regulation.

A. The Decision Appealed From Does Not Violate the Sherman Act.

The applicable law in that respect is found in 15 USCA 1, which in part provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce *among the several States,* or with *foreign*

nations, is declared to be illegal: * * *." (Emphasis supplied.)

The proceeding before the Commission did not involve trade or commerce among the several states or with foreign nations. Neither did it involve a "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce. . . ." It involved only the determination that The Pacific Telephone & Telegraph Company had dedicated a particular type of common carrier communications service to the use of the public, and the reasonableness of the filed tariff rates therefor—a determination within the exercise of the jurisdiction of appellee Commission as an agency of the sovereign State of California, and within the area of the powers and duties reserved to the State by 47 USCA 152(b).

Appellants have cited several decisions in support of their contention that the decision appealed from violates the Sherman Act. These would be excellent authority, if applicable.

The case of *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 87 L. ed. 165, has nothing in common with the case at bar.

A license contract provided that on sales of licensed transformers in *interstate* commerce, petitioner should conform to prices fixed by respondent.

On page 168 of the Lawyers' edition we find:

> "Agreements fixing the competitive sales price of articles moving *interstate*, not within the protection of a patent, are unlawful *because prohibited by the Sherman Act.*" (Emphasis supplied.)

The case of *Northern Securities Co. v. U.S.*, 193 U.S. 197, 48 L. ed. 679, was an appeal from a decree enforcing the provisions of the antitrust act against combinations in restraint of *interstate or foreign commerce.* Again, we can discern no application to the facts presently before this Court.

The case of *Parker v. Brown*, 317 U.S. 341, 87 L. ed. 315, cited by appellants, can offer them but cold comfort.

There, the appellee, a producer and packer of raisins in California, sought to enjoin those charged with the administration of the state's Prorate Act from enforcing against appellee a program for marketing a crop of raisins. Appellee alleged that the marketing program was an illegal interference with and an undue burden upon interstate commerce and a violation of the Sherman Act. The great bulk of the raisins produced were ultimately to be shipped in interstate or foreign commerce.

On page 325 of the Lawyers' Edition this Court held:

> "We may assume also, without deciding, that Congress could, in the exercise of its commerce power, prohibit a state from maintaining a stabilization program like the present because of its effect on interstate commerce. Occupation of a legislative 'field' by Congress in the exercise of a granted power is a familiar example of its constitutional power to suspend state laws. (Citing cases.)
>
> • • • • • • •
>
> "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's

control over its officers and agents is not lightly to be attributed to Congress. (p. 326)

* * * * * * *

"*The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.*" (Emphasis supplied) (p. 327)

This Court reversed the decree granting injunction.

Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 95 L. ed. 1035, involved the effect of a state statute upon an *interstate* marketing agreement to sell products at a fixed price. While such an agreement, purporting to restrain trade or commerce *among the several states*, would have been unlawful under the Sherman Act, the Court was concerned with the effect of the Miller-Tydings amendment. That amendment expressed, within limits, congressional approval of state fair trade acts. Thus, said the Court on page 1045 of the Lawyers' Edition:

"If a distributor and one or more retailers want to agree, combine, or conspire to fix a minimum price, they can do so if state law permits. . . . They can fix minimum prices pursuant to their contract or agreement with impunity. When they seek, however, to impose price fixing on persons who have not contracted or agreed to the scheme, the situation is vastly different. That is not price fixing by contract or agreement; that is price fixing by compulsion.

* * * * * * * *

"It should be noted in this connection that the Miller-Tydings Act expressly continues the prohibi-

> tions of the Sherman Act against 'horizontal' price fixing by those in competition with each other at the same functional level. Therefore, when a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids. (Citing cases.)"

In the instant proceeding, the Sherman Act is inapplicable because no interstate or foreign commerce is involved, and neither, of course, is the Miller-Tydings Amendment. Nor is there a conspiracy or combination in restraint of trade, or the requirement by appellee Commission of any conduct which any federal law prohibits. If appellants have cited this case because of any fancied analogy they think it might bear to the instant proceeding, though factually so at variance, it may be well also to point out that appellee Commission did not, by the decision from which appeal is sought, compel anyone to follow any parallel price policy, nor attempt to regulate appellants in any manner whatever. Like the other cases cited by appellants, the *Schwegmann* case is inapplicable here.

B. The Decision Appealed From Does Not Conflict With the Communications Act.

Appellants urge that the decision of appellee Commission from which this appeal is sought conflicts with "the paramount federal policy" of the Communications Act. Appellee Commission respectfully submits that the most searching scrutiny reveals no conflict. On the contrary, the Communications Act, while setting forth in scrupulous detail the powers and duties of the Federal Communica-

tions Commission, specifically reserves to the states jurisdiction with respect to "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier. . . ." (47 USCA 152(b))

The only reservation in 152(b) to the jurisdiction of the states is contained in Sec. 301. There we find that the purpose of the chapter is to maintain the control of the United States over all the channels of *interstate or foreign radio transmission.* Purely intrastate transmission of energy or communications or signals by radio must be licensed by the Federal Communications Commission when its effects extend beyond the borders of the state, or when interference is caused thereby beyond the borders of the state. No such condition prevails here.

Section 313 makes the antitrust laws relative to "unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade" applicable to the manufacture and sale of and trading in radio apparatus and devices entering into or affecting interstate or foreign commerce and radio communications. The decision appealed from is not an unlawful restraint or monopoly or combination, contract or agreement in restraint of trade. *(Parker v. Brown, supra.)* Neither has it to do with manufacture, trading in or sale of radio apparatus or devices, nor does it enter into the field of or affect interstate or foreign commerce or radio communication.

Section 602(d), Communications Act of 1934, cited by appellants on page 13 of their Jurisdictional Statement,

merely confers authority on the Federal Communications Commission to enforce compliance of laws against restraints and monopolies where applicable to common carriers engaged in wire or radio communication or radio transmission of energy.

Appellants allege (p. 13, Juris. St.) that the approval of the California Supreme Court sanctioned Pacific's voluntary tariff for the leasing and maintenance of radio equipment "despite the prohibitions of the antitrust laws on monopolistic tying arrangements", and cite, in a footnote, the case of *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 4, 2 L. ed. 2d 545. In that case, the railroad had sold and leased lands with a "preferential routing" clause which compelled grantees to ship over its railroad all commodities produced on the land, provided that the rates were equal to those of competing carriers. The applicability of the Sherman Act is clear in that case, since we find the following on page 548 of Lawyers' Edition:

> "Since many of the goods produced on the lands subject to these 'preferential routing' provisions are shipped from one State to another the actual and potential amount of interstate commerce affected is substantial."

It is further applicable in that case, as it is not here, because there actually were agreements which the Court found to be in restraint of commerce among the several states. In the instant proceeding interstate commerce is not involved. The subject matter is the recognition by appellee Commission of the public utility status of appellee Pacific in furnishing private mobile communications

service, and the filing of compensatory tariff rates therefor.

Nor is there any "tying arrangement" involved. The Court defines such an arrangement "as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." (p. 550 of Lawyers' Edition.)

Pacific's Cal. Public Utilities Commission Tariff No. 108-T, (part of record on appeal) the tariff which appellants charge was sanctioned by the California Supreme Court despite "monopolistic tying arrangements", (p. 13, Juris. St.) *does not contain any tying arrangements.* On 1st Revised Sheet 4 and Original Sheets 5 and 6, the Court will note that all land station equipment is separately priced, item by item. The furnishing of one is not made conditional upon the purchase or lease of another. The same is true of mobile station equipment (1st Revised Sheet 7) and supplemental equipment (Original Sheet 8). The conditions of service (Original Sheet 13) provide that private mobile services will be furnished on a lease and maintenance basis to those licensed by the Federal Communications Commission. In an emergency or if Pacific after notice fails to provide necessary maintenance, the station licensee may make repairs or procure maintenance from another source during such emergency or failure. In cases involving unusual circumstances, the station licensee himself may be required to install and maintain portions of the facilities.

There is no condition that a station licensee must not purchase from or deal with any other supplier.

Neither is appellee Commission convinced that those who deal with Pacific would have their licenses set aside by the Federal Communications Commission "for being based on contracts that violate the federal anti-trust laws as well as the federal anti-trust decree. Cf. *Connecticut Water Co.*, 25 F.C.C. 1367, 1379 (1958)." (p. 14, Juris. St.)

As has already been asserted herein, the federal anti-trust laws are not applicable. Appellee Commission found, and the California Supreme Court affirmed, that the consent decree was inapplicable to the situation at bar because Pacific's dedication is that of a common carrier communications service not prohibited by the consent decree Pacific's charges are subject to the regulation of appellee Commission. The *Connecticut* case turns on the question of whether Southern New England Telephone Company which furnished the private mobile service was or was not a subsidiary of the American Telephone & Telegraph Company within the meaning of the consent decree. Although the decision mentions that the telephone company furnishes common carrier communications services, apparently they were not involved, since they would have come within the exception in the consent decree. The regulation or non-regulation by the state of charges for the service was not once mentioned in the decision. For all that the case discloses, the service was not a public utility service and the charges therefor were not subject to regulation. Certainly that case is no authority for the contention on page 8 of the Jurisdictional Statement that the California Supreme Court in its decision quoted from a "now rescinded" dictum by the Federal Communications Commission. On the contrary, it appears from ap-

pellants' footnote 10, (p. 8 Juris. St.) that that Commission had not, as of January 8, 1959, assumed any position on the effects of the consent decree when the service is found, as here, to be common carrier communications service subject to state regulation.

The case of *Benanti v. U.S.*, 355 U.S. 96, 2 L. ed. 2d 126 is cited by appellants in support of their assertion that the Communications Act provides plenary and paramount policy in the field of communications, superseding all but the powers of the states. Appellee Commission agrees with the premise, but cannot discern any application of the cited case or of the premise to the decision appealed from.

In the *Benanti* case, a state authorized a wire tap to intercept a telephone message subsequently introduced in evidence in a federal court in a prosecution involving a narcotics law violation. Section 605 of the Communications Act expressly prohibits the use in evidence of a message so intercepted. This Court held (pp. 132-133 of the Lawyers' Edition) that prohibition applicable to both interstate and intrastate communications.

> ". . . Congress did not intend to place the protections so plainly guaranteed in §605 in such a vulnerable position. Respondent points to portions of the Act which place some limited authority in the States over the field of interstate [sic] communication. The character of these matters, dealing with aspects of the regulation of utility service to the public, is technical in nature in contrast to the broader policy considerations motivating §605. Moreover, the very existence of these grants of authority to the States underscores the conclusion that had Congress intended to

allow the States to make exceptions to §605, it would have said so."

In footnote 16 on page 133 of the Lawyers' Edition, the Court points to 47 USC (Supp. II) §152(b), as the reservation to the states of the power, "technical in nature", to regulate "charges, classifications, practices, services, facilities or regulations for or in connection with intrastate communication service by wire or radio of any carrier." In exercising its clearly reserved powers, the Commission has not contradicted any prohibition of the Federal Communications Act, as was the situation in the *Benanti* case, nor any policy enunciated in that or any other section of the Act. On the contrary, it operated within the jurisdiction reserved to it by the specific statutory provisions of Section 152(b). While Congress might constitutionally subtract even this jurisdiction from the states' authority, it has not done so. To assert that there is an unexpressed purpose to nullify a state's control within the area expressly reserved to the state would indeed make of the law, in the words of the immortal Mr. Bumble, "a ass, a idiot".

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3. THE DECISION COMPLAINED OF IS NOT REPUGNANT TO THE FOURTEENTH AMENDMENT TO THE CONSTITUTION.

Appellants are not subject to regulation by appellee Commission because, unlike appellee Pacific, they can and do pick and choose their customers. It is difficult—indeed, impossible—to conceive how they have been denied either due process of the laws or their equal protection, or how they have been injured by the Commission's decision, nor

does the Jurisdictional Statement point to any particulars in this respect. Instead of presenting a real, substantial controversy, appellants conjure up bogies from the future clothed with such protoplasmic language as "taking over", "jeopardizing economic survival" or "permitting a monopoly to prey on its independent competitors." (Juris. St. p. 19.) No suggestion is advanced as to how this may be accomplished, nor are there any particulars given in the statement in the cited article on page 19 of the Jurisdictional Statement that Pacific is protected by the state against destructive competition. and that it is now in a position to preempt the field of lease-maintenance of radio equipment to individual users for private purposes. There is nothing in the record before this Court to justify appellants' fears, and the Commission found that they were not well founded. (55 Cal. PUC 387, 398.)

The California Supreme Court affirmed the Commission's decision in this respect in the following language:

> "Until the commission attempts regulation of these petitioners [appellants], they have no occasion to complain that they are denied due process of law by the commission's acceptance of Pacific's tariff. (Citing cases.)" (p. A9, Append. Juris. St.)

Properly speaking, this is the mere assertion of a claim in respect of some constitutional right which this Court found insufficient to raise a federal question in *U.S. Fidelity & Guaranty Co. v. Oklahoma,* 250 U.S. 111, 63 L. ed. 876.

Appellants undoubtedly confuse public utility status with monopoly. Appellants seek to preserve competition

by barring a competitor; they ignore the fact that regulation precludes Pacific from entering into price competition with its competitors and from underbidding them, and compels Pacific to serve those whom its competitors may not elect to serve. While a regulated monopoly is not absolutely invulnerable to the antitrust statutes, as a general proposition, public regulation removes the curse of illegality from such a monopoly. A regulated monopoly is perfectly consistent with the public interest. However, there is no monopoly here, either regulated or unregulated.

There is no known law which prohibits a person from providing the same service a public utility provides, the only limitation being that he must avoid placing himself in the status of one who has dedicated. Neither party has any legal complaint on grounds of competition from the other. This principle is as true in the telephone field as in any other; there is no law which prohibits a man from providing standard telephone service provided he does so on a selective basis falling short of a general dedication. Non-utility telephone systems do in fact exist though obviously they cannot be as comprehensive as Pacific's general system without crossing into the field of dedication.

Appellants' confusion may stem from the fact that as between two or more services *both or all* of which admittedly are public utility, the public interest frequently dictates authorization for only one service in a given area, usually in order that uneconomic duplication of facilities may be avoided. This is particularly true in the general telephone field where it would not only be uneconomical

but inconvenient if a telephone user had to subscribe to several telephone services, each providing its own hand instrument, in order to be sure of reaching anyone whom he might desire to call.

The problem of uneconomic duplication does not exist in the field of private mobile radio service for, even if there were a number of competing utilities offering the service, it would be up to the subscriber to choose, and he would have no need to subscribe to more than one because the service of any one would be complete in itself.

On this "monopoly" aspect, the analogy of private mobile service to the trucking field is pertinent. In California, public utility highway common carriers and non-public utility highway contract carriers exist side by side in large numbers and frequently compete with each other strenuously.

Appellants find it odd that public utility status in the action before appellee Commission was "confined *solely* to the Pacific Telephone and Telegraph Company. (p. 18, Juris. St.) It would be even more odd if such status had been "extended to the numerous other enterprises, such as appellants, which carry on the identical business and compete for the same customers, often with identical equipment that is leased by the Telephone Company to private users" (idem) since their status was not before the Commission and since they have not assumed the obligations of a public utility.

The Commission did, as appellants state in footnote 20 (p. 19, Juris. St.) place "great store" in Pacific's dedication to the public of its property and service. Without

such dedication to serve all who require private mobile communications service at a specified tariff rate, Pacific could not have been considered to be offering a public utility service.

It is not incumbent on appellee Commission to allay appellants' vague and formless fears, but the inference that the Commission's regulation, which discriminates against no one, is "imposed for the sake of private monopoly rather than the protection of the public" (p. 20, Juris. St.) cannot be allowed to remain unchallenged. The public interest is and has been the paramount concern of appellee Commission. The record before this Court discloses [Rep. Tr. p. 172] that Pacific obtains the equipment used in the private mobile communications service largely from suppliers outside of the Bell System. It buys on the open market from the same sources which supply its competitors.

In California, at least, Pacific is required to and does keep separate records of its costs of providing the service here in question and to charge compensatory rates therefor in order that its telephone customers may not be put in the position of subsidizing the private mobile communications service. It is expressly precluded from discrimination in the matter of interconnection of private mobile equipment with its general exchange and toll switching system as between its own private mobile customers and those of its competitors. (55 Cal. PUC 387, 401-5)

The Jurisdictional Statement fails utterly to show wherein any constitutional right of appellants has been violated, because there has been no violation.

CONCLUSION.

Appellee Commission respectfully submits that this Court should dismiss appellants' appeal from the decision of the Supreme Court of the State of California, affirming the decision of this Commission, for the reason that it presents no substantial federal question.

Dated, San Francisco, California,
March 16, 1959.

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JAMES R. BROWNING, Clerk

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1958

No. 719

COMMERCIAL COMMUNICATIONS, INC., et al.
and
WATSON COMMUNICATIONS SYSTEMS, INC., et al.,
Appellants,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA
and
THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY,
Appellees.

On Appeal from the Supreme Court of the State of California

MOTION OF APPELLEE THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY TO DISMISS APPEAL
and
BRIEF IN SUPPORT THEREOF

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OCTOBER TERM, 1958

No. 719

COMMERCIAL COMMUNICATIONS, INC., et al. and WATSON COMMUNICATIONS SYSTEMS, INC., et al.,
Appellants,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY,
Appellees.

On Appeal from the Supreme Court of the State of California

MOTION TO DISMISS APPEAL

The Pacific Telephone and Telegraph Company, one of the appellees herein, moves this Court, pursuant to Rule 16, subdivision 1, to dismiss the appeal herein on each and all of the following grounds:

1. The appeal is not within the jurisdiction of this Court because not taken in conformity to statute in that

it does not draw into question the validity of a state statute.

2. Appellants have no interest sufficient to sustain this appeal because neither the order of the Supreme Court of California nor the order of the California Public Utilities Commission affirmed by that court undertakes to regulate appellants or directs or prohibits any action by appellants.

3. The appeal does not present a substantial federal question.

BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL

I.

OPINIONS BELOW

The opinion of the Supreme Court of California is reported in 50 Cal.2d 512, 327 P.2d 513, and is reprinted in the appendix to appellants' Jurisdictional Statement. Our page references to this opinion will be to appellants' appendix thus—(Cal.Sup.Ct. 1).

The opinion and order of the Public Utilities Commission of California, affirmed by the State Supreme Court, is reported in 55 Cal.P.U.C. 387, 17 PUR 3d 200, and is reprinted as an appendix to this brief. Our page references to this opinion will be to our appendix thus—(Cal. Comm. 1).

II.

STATUTES INVOLVED

The statutes involved are the portions of the Federal Communications Act next quoted, and the portions of the California Constitution and Public Utilities Code quoted in the opinion of the Court below (Cal.Sup.Ct. 5, 6).

Section 2 (b) of the Federal Communications Act (47 U.S.C. 152 (b)), with regard to the jurisdiction of the Federal Communications Commission, provides in part:

> "Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services,

facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or * * *."

Section 3(e) of the Communications Act (47 U.S.C. 153 (e)) provides in part:

"For the purposes of this chapter, unless the context otherwise requires—

* * * * *

(e) 'Interstate communication' or 'interstate transmission' * * * shall not, with respect to the provisions of subchapter II of this chapter, include wire or radio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission."

III.

THE QUESTIONS PRESENTED

The question in this case is whether the intrastate service here rendered by appellee Telphone Company is a public utility telephone service, and, therefore, subject to regulation by State authority under the Constitution and statutes of California. All three alleged federal questions presented by appellants' Jurisdictional Statement (p. 4) are unsubstantial. This will be demonstrated in our argument.

IV.

STATEMENT OF THE CASE

Appellants' statement of the case contains inaccuracies and omissions so serious that correction requires a restatement.

The precise point in this case is the correctness of the ruling of the California Public Utilities Commission, affirmed by the State Supreme Court, in accepting a tariff filing (Schedule No. 108-T) by appellee Telephone Company. The tariff and the case itself relate to one aspect of intrastate mobile radiotelephone communication service furnished in California by appellee Telephone Company (sometimes referred to as "Pacific").

As the name indicates, mobile radiotelephone communication is between vehicles, moving or movable, and other vehicles or fixed points (Cal.Sup.Ct. 3-4). It involves the use of radio for which frequencies are allocated by the Federal Communications Commission under authority of the Federal Communications Act (47 U.S.C. 301, 303, 307, 309) and under Commission rules.

In one type of mobile service the telephone communications go through the general network of the Telephone Company (Cal.Sup.Ct. 4). Thus, a doctor wanting to telephone from his automobile to a patient or to the hospital calls the patient's or hospital's number through the Telephone Company. The doctor's office calls through the Telephone Company to reach the doctor's car. So it is in many other cases such as the traveling businessman keeping in touch with his office or customers. The radio frequencies used in this type of communication are allocated

to the Telephone Company by the Federal Communications Commission (F.C.C. Rules, 47 C.F.R., Part 21).

The above type of communication is for convenience called "public mobile." Ever since it became practicable the Telephone Company has rendered public mobile service as a public utility common carrier communication service under published tariffs (Cal.Sup.Ct. 4). The present case involves *no question* concerning public mobile service. There are, however, some practical public needs which such service does not meet (Cal.Sup.Ct. 4), and this fact points up the problem with which the present case *is* concerned.

A police car, needing immediate communication with a squad car or the police station, cannot afford time to call through the telephone exchange or to wait through busy signals. The same is true of the fire department, of forest fire patrols, locomotives, and power house operatives in remote places. A truck operator talking to another truck or a taxi driver talking to his dispatcher can more efficiently make his calls direct. There are many similar instances (see examples, Cal.Comm. 13).

To meet such needs, the Federal Communications Commission, on a proper showing, licenses individuals or businesses of certain types, to use certain frequencies for their "private" purposes (F.C.C. Rules, 47 C.F.R., Parts 7, 8, 9, 10, 11, 16 and 19). Telephone calls under these licenses do not go through a Telephone Company operator, but directly between the vehicles or stations of the licensee, quite comparably to the broker's use of his "private line" or "private wire." Connection with the general telephone system is, however, possible and permissible in case of emergency (Cal.Sup.Ct. 6).

To use the private frequency allotted him by the Federal Communications Commission, the licensee must, of course, obtain radiotelephone equipment and arrange for its upkeep and maintenance. The provision of such service, i.e., the furnishing of mobile radiotelephone equipment on a lease-maintenance basis, constitutes the so-called "private mobile service" covered by Pacific's tariff.

Pacific entered the private mobile field in 1948 by contracting with two customers to lease them equipment and maintain it (Cal.Comm. 6). In 1954 the California Public Utilities Commission required Pacific to file copies of all its private mobile contracts (Decision No. 50837, 53 Cal. P.U.C. 662, not reported in PUR). In 1955 the Commission required modification of contracts between Pacific and two of its customers, but held that it would not then require tariff filings because of insufficient experience with private mobile for the proper fixing of rates (*Southern California Gas Company* (1955) 54 Cal.P.U.C. 75, 80-81, 9 PUR 3d 193).

On March 30, 1956, Pacific filed the tariff schedule involved in the present case (Cal.Comm. 2). It thereby offered to serve without discrimination, and under tariff charges, all members of the public entitled to private mobile service, i.e., persons licensed by the Federal Communications Commission to use private mobile frequencies (Cal. Sup.Ct. 4, 5).

When Pacific filed this tariff its private mobile business represented 4½ per cent of California's total business (Cal.Sup.Ct. 5). Holding more than 95 per cent were 100 competitors of Pacific, large and small (Cal.Comm. 12).

A number of these competitors protested to the Commission against acceptance of Pacific's tariff (Cal.Comm. 3). When the Commission did accept it, only a few protestants sought to review the Commission's order in the California Supreme Court (Cal.Sup.Ct. 2), and only the present appellants have tried to come into this Court.

The protestants argued to the California Commission that acceptance of the tariff would tend to promote a monopoly by Pacific. Overruling this contention, the Commission found that the business is "highly competitive" (Cal.Comm. 12). It found, as said above, that Pacific had more than 100 competitors, and only 4½ per cent of the total business (Cal.Comm. 6, 12); further that Pacific's presence in the field constituted no "threat to the continued vigor of its competitors" (Cal.Comm. 20); also that regulation is not a competitive advantage but a competitive handicap, saying:

> "The Commission finds that competition of regulated companies with the nonregulated, if it is unfair at all, is more likely to be unfair to the regulated rather than to the nonregulated competitors" (Cal. Comm. 21).

The California Supreme Court affirmed the foregoing and similar findings of the Commission, saying in part (Cal.Sup.Ct. 9):

> "The commission found as a fact that there was no unfair competition by Pacific in this field, and ruled that it would not allow Pacific to give its private mobile customers service which it would not make available to the customers of its competitors and that it would require Pacific to maintain charges which would be fully compensatory."

None of the protestants below, including the present appellants, have ever dedicated their private mobile facilities to public use; all of them have maintained their absolute right to deal as they choose and with whom they choose (Cal.Comm. 24). Nevertheless, they contended that the Commission's regulation of the Telephone Company might subject them to regulation. The Commission overruled this contention (Cal.Comm. 24) and the Supreme Court of California affirmed, saying (Cal.Sup.Ct. 9):

> "No jurisdiction over the petitioners or other competitors of Pacific in this field has been asserted by the commission, and in its order it expressly disclaims any intention to assert such jurisdiction until there should be evidence that they had dedicated or were willing to dedicate their service to the public. Until the commission attempts regulation of these petitioners, they have no occasion to complain that they are denied due process of law by the commission's acceptance of Pacific's tariff. (*Stephenson v. Binford*, 287 U.S. 251, 277; *Continental Baking Co. v. Woodring*, 286 U.S. 352, 367-369; *Hicklin v. Coney*, 290 U.S. 169, 172-173.)"

Certain protestants contended below that the Commission's acceptance of Pacific's tariff involves violation of an antitrust consent decree rendered by the United States District Court for the District of New Jersey, January 24, 1956, in *United States v. Western Electric Company, Incorporated, et al.*[1] *(unreported)*.

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[1]Appellants make no showing (such as, we submit, is required by Rule 15(d)) as to when, how, or if ever, *they*—as distinguished from parties below who are not appellants here—raised any question below as to the consent decree. See *Sully v. American National Bank* (1900) 178 U.S. 289, 297-298.

As regards the present case the situation with respect to the consent decree is this: Appellants, who are not parties to the consent decree, assert that it unqualifiedly prohibits Pacific (as a subsidiary of American Telephone and Telegraph Company) from engaging "in the private radio business" (Jur.St. 10). Pacific contends, to the contrary, that the decree, Sections II and V of which are partially quoted below, permits Pacific to lease and maintain private mobile communication systems without restriction, where the charges therefor *are subject to public regulation*, i.e., rendered as a common carrier communication service; and that it also permits Pacific to continue rendering such mobile service to certain customers for a period of five years from the date of the decree (Jan. 24, 1956) even where the charges are *not* subject to such regulation.[2]

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[2]Section V of the decree partially reads:

"The defendant A T & T is enjoined and restrained from engaging, either directly, or indirectly through its subsidiaries other than Western and Western's subsidiaries, in any business *other than the furnishing of common carrier communication services;* provided, however, that this Section V shall not apply to (a) furnishing services or facilities for the plaintiff [U.S. Government] or any agency thereof * * * (d) for a period of five (5) years from the date of this Final Judgment leasing and maintaining facilities for private communications systems, *the charges for which are not subject to public regulation*, to persons who are lessees from defendants or their subsidiaries of such systems forty-five (45) days after the date of this Final Judgment * * *" (italics ours).

Section II of the decree, in stating definitions "For the purposes of this Final Judgment," provides in subdivision (i):

"'Common carrier communications services' shall mean communications services and facilities, other than message telegram service, the charges for which are subject to public regulation under the Communications Act of 1934, or any amendment thereof, or would be subject to such regulation thereunder if such a service or facility were furnished in interstate commerce; and shall also include any communications

This conflict of interpretation has never been presented to the district court which made the decree, though the decree contains the usual reservation of jurisdiction (section XVII, not mentioned in appellants' Jurisdictional Statement). Appellants invoke the interpretation of the Department of Justice (Jur.St. 8) as stated in proceedings before the Federal Communications Commission involving a tariff filing by American Telephone and Telegraph Company which is mentioned in the Jurisdictional Statement (p. 8). In this regard the California Supreme Court (Cal.Sup.Ct. 12-13) referred to the following statement contained in a memorandum opinion of the Federal Communications Commission released November 21, 1957 (23 F.C.C. 689, 692-693):

> "Justice, in its most recent pleading herein, has apparently taken the position that the Decree absolutely prohibits the respondents from leasing and maintaining equipment and facilities for private mobile communications systems as described in the tariff here at issue, whether or not this service is found to be a common carrier communication service. AT&T., the other party to the Decree, has taken an opposite view. Under such circumstances of disagreement between the parties to the Decree, it would appear that the most logical course to be followed in effectively resolving the conflict of interpretation is for one or both of the parties to apply to the court in which the Decree was rendered for such interpretation or clarification of the Decree as may be necessary. By the terms

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service or facility, other than message telegram service, *the charges for which are or become subject to regulation under existing or future laws of any state,* territory, or the District of Columbia, but only in the jurisdiction or jurisdictions in which the charges for such service or facility are subject to regulation" (italics ours).

of the Decree (Section XVII), that court appears to have retained continuing jurisdiction for this very purpose, among others. Obviously, this Commission has no standing to apply for such a determination. As we stated in our previous Memorandum Opinion of May 29, 1957, and as will be more fully developed hereinafter, we have been unable to find any basis in the specific language of the Decree to support the contention of PIEA and Justice as to the effect of the Decree. If, as has been contended, it is the *intent* of the Decree to absolutely prohibit the service, regulated or unregulated, then to the extent that such intent is not evident from the plain language on the face of the Decree, it would appear that only the court having original jurisdiction of the cause in which the Decree was entered may competently look beyond such language"[3] (italics by the Commission).

The California Supreme Court held that, in this state of affairs, the consent decree did not warrant the court in interfering with the decision of the California Public Utilities Commission (Cal.Sup.Ct. 13; see also Cal. Comm. 21-22).

The controversy over the meaning of the consent decree has, however, very recently led to a practical consequence outside the record of this case, but of which this Court should be informed.

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[3]Appellants incorrectly refer to this passage as "a now rescinded dictum by the Federal Communications Commission," citing *The Connecticut Water Co. et al.* (1958) 25 F.C.C. 1367, 1377 (Jur.St. 8). The service involved in the cited case, however, was not subject to public regulation; hence, appellants' reference to the case is not only pointless but misleading, as concerns the case at bar.

The Department of Justice has stated as its position that, notwithstanding the decision of the California Supreme Court upholding the decision of the California Commission accepting Pacific's tariff covering private mobile lease-maintenance service, Pacific cannot furnish such private mobile service to persons who were not lessees of private mobile systems on March 11, 1956, and in any event cannot furnish such service at all after January 24, 1961.[4]

Pacific believes, as here contended, that the Department misconstrues the consent decree. Pacific cannot, however, shut its eyes to the practical fact that the controversy over the meaning of the decree may not be finally determined by January, 1961. Neither can Pacific shut its eyes to the effect of this uncertainty upon its customers under the tariff. Fairness requires that they have ample time in which to make other arrangements if by January 24, 1961, Pacific should be compelled to stop serving them. In fairness to its customers, therefore, and on March 17, 1959, Pacific filed with the California Public Utilities Commission an application for authority to cancel its tariff Schedule No. 108-T, and to withdraw from the furnishing of private mobile communications service on a lease-maintenance basis by January 24, 1961, except as to service which may be provided to the United States Government. The Commission has not yet ruled on this application.

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[4]This position is set forth in Department letters to the Federal Communications Commission dated October 14, 1958, and February 20, 1959, the February letter appearing in F.C.C. Docket 12722.

V.

ARGUMENT

THE APPEAL SHOULD BE DISMISSED:

A. The appeal does not draw into question the validity of a state statute, but only the validity of a nonlegislative order of the State Public Utilities Commission.

Appellants' appeal is based on section 1257 (2) of Title 28 of the United States Code, so that the ground must be that the appeal draws into question the validity of a state statute. It is therefore significant that *no state statute* is cited in appellants' "Statutory Provisions Involved" (Jur. St. 3). Appellants say only that "The court below also considered several California statutory and constitutional provisions" (Jur.St. 3).

Nor does the appellants' argument attack the validity of any provision of the California Constitution or Public Utilities Code, whether cited by the court below or not. The only "state statute" drawn into question by appellants is the order of the California Commission affirmed by the State Supreme Court.

Decisions of a state commission which are "legislative" in character may be "statutes" within the meaning of 28 U.S.C. 1257 (2) for purposes of appeal, but an appeal is not supported by challenge of a *nonlegislative* commission decision (*Latshaw v. Missouri ex rel. K. C. Public Service Co.* (1930) 282 U.S. 806; *Catholic Order of Foresters, Inc. v. North Dakota* (1937) 301 U.S. 665).

Appellants do not question the fairness of the rates fixed by the Commission's order below or any other part of the order which could possibly be legislative in character. They attack the Commission's determination that it had jurisdiction under the California Constitution and

statutes (quoted Cal.Sup.Ct. 5-6) to regulate Pacific's private mobile service as a public utility telephone service. This was a judicial, not a legislative, determination.

The Commission, a body created by the California Constitution (Art. XII, sec. 22), exercises judicial as well as legislative functions (*Pacific Telephone etc. Co. v. Eshleman* (1913) 166 Cal. 640, 650, 137 Pac. 1119, 1121-1122; *Atchison etc. Ry. Co. v. Railroad Com.* (1931) 212 Cal. 370, 374, 298 Pac. 991, 992; *People v. Lang Transportation Co.* (1932) 217 Cal. 166, 170, 17 P.2d 721, 723).

In *People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 632, 268 P.2d 723, 729, appeal dismissed (1954) 348 U.S. 859, the California Supreme Court held that the California Commission exercised *judicial* powers in determining that (1) defendant performed intrastate air common carriage; (2) defendant was a public utility subject to the jurisdiction of the Commission; and (3) the Federal Civil Aeronautics Act did not deprive the California Commission of power to regulate intrastate fares (42 Cal.2d 629-630, 268 P.2d 728).

In *Latshaw v. State of Missouri ex rel. Kansas City Public Service Co.* (1930) 282 U.S. 806, the appellant unsuccessfully urged, as the basis for jurisdiction, that the actions of the state commission—a rate-making body—in taking jurisdiction of the application of a street car company for a change of rates and in setting the matter for hearing were "statutes". The appeal was dismissed for want of jurisdiction.

At page 3 of the Jurisdictional Statement, appellants cite *Cities Service Gas Co. v. State Corporation Comm'n* (1958) 355 U.S. 391 and other cases as establishing juris-

diction of this Court "to review the judgment of the Supreme Court of California by appeal"—a broad statement, certainly. In so far as these cases cited by appellants involved review of administrative orders, they involved administrative action, legislative in character. They are irrelevant here where the challenged Commission action was judicial.

B. Appellants have no interest sufficient to sustain this appeal because they are not affected by the order appealed from. That order does not regulate them or direct or prohibit any action by them.

The order below regulates Pacific only. It does not regulate appellants or require them to do anything or not to do anything. The California Supreme Court said (Cal.Sup. Ct. 9):

> "No jurisdiction over the petitioners or other competitors of Pacific in this field has been asserted by the commission, and in its order it expressly disclaims any intention to assert such jurisdiction until there should be evidence that they had dedicated or were willing to dedicate their service to the public. Until the commission attempts regulation of these petitioners they have no occasion to complain that they are denied due process of law by the commission's acceptance of Pacific's tariff. (*Stephenson v. Binford*, 287 U.S. 251, 277; *Continental Baking Co. v. Woodring*, 286 U.S. 352, 367-369; *Hicklin v. Coney*, 290 U.S. 169, 172-173.)"

The above statement about due process is supported by the citations made to decisions of this Court.

It is also settled that an appellant cannot question the constitutionality of state legislation unless he is within the class affected by the unconstitutional feature, which

the present appellants are not (*Arkadelphia Co. v. St. Louis S.W. Ry. Co.* (1919) 249 U.S. 134, 149; *Heald v. District of Columbia* (1922) 259 U.S. 114, 123; *Southern Railway Co. v. King* (1910) 217 U.S. 524, 534; *Bode v. Barrett* (1953) 344 U.S. 583, 586).

Appellants argue that the California Commission order is unconstitutional because "discriminatory" as to the Telephone Company (Jur.St. 18). But appellants, who are not affected by the order, are not entitled to champion constitutional rights of others (*Aetna Insurance Co. v. Hyde* (1928) 275 U.S. 440, 446-447; *Dayton-Goose Creek Ry. v. U.S.* (1924) 263 U.S. 456, 484; *Sprout v. South Bend* (1928) 277 U.S. 163, 167).

C. The appeal does not present a substantial federal question.

Even if substantial federal questions could exist as to the validity of the order below, appellants, as just shown, would have no standing to raise them because the order does not apply to appellants.

Moreover, the three questions raised by appellants are all unsubstantial. The following facts are important, preliminarily in that regard: (1) This case involves *intrastate* service (Cal.Sup.Ct. 11); and (2) the California Supreme Court and the California Commission in upholding the State's right to regulate made very pertinent findings; i.e., that the field here involved is highly competitive (Cal. Comm. 12); that Pacific has less than 4½ per cent of the business therein (Cal.Comm. 6); that regulation of Pacific would not be a help but a handicap as against competitors (like appellants) free of regulation (Cal.Comm. 21); that Pacific's participation as a public utility in this field offers no threat to competitors (Cal.Comm. 20); that Pacific un-

der the Commission order cannot withhold from customers of competitors in this field any service available to its own customers (Cal.Sup.Ct. 9); that there has been no unfair competition by Pacific (Cal.Sup.Ct. 9); that regulation in this case involves no tendency toward monopoly, and that regulated and nonregulated services compete in many fields (Cal.Sup.Ct. 7, 9).

These findings, of course, are entitled to the respectful consideration of this Court and are to be accepted unless demonstrated to be erroneous on the record (*Pick Mfg. Co. v. General Motors Co.* (1936) 299 U.S. 3, 4). Appellants' whole argument, however (Jur.St. 10-20), is predicated on disregard of these findings or unsupported statements which contradict them.

1. There is no substantial federal question under the Fourteenth Amendment.

Appellants' point is that the opinion below does not "reflect a rational reason why the private radio business in California should be deemed a 'public utility'" (Jur. St. 16). This presumably is intended to say that the Fourteenth Amendment prohibits the states from regulating the type of intrastate radiotelephone communication service involved in the present case.

This point, we submit, was correctly disposed of below. In answer to arguments based on the Fourteenth Amendment, the California Supreme Court pointed out many respects "in which the private mobile communication systems are of public concern" including their use "by public transportation companies, trucking companies, law enforcement agencies, fire departments, and utility companies such as irrigation and water companies" (Cal.Sup.

Ct. 9). The court held that these and other matters of public concern, to which it referred, afford a reasonable basis for public regulation where the property involved has been dedicated to public use, and that the Fourteenth Amendment does not prohibit such regulation (Cal.Sup. Ct. 8, 9-10). We submit that this ruling was manifestly correct *(Nebbia v. New York* (1934) 291 U.S. 502, 531-532; *Cities Service Co. v. Peerless Co.* (1950) 340 U.S. 179, 186).

2. There is no substantial federal question under the Federal Communications Act.

Appellants' point here is that the order below "conflicts with the paramount federal policy of the Communications Act for the competitive development of radio" (Jur.St. 12).

In reply we refer again to findings below, based on ample evidence, that there has been no unfair competition by Pacific and that regulation of Pacific will promote, not decrease, competition (supra, 8-9, 17-18).

We also point out again that this case involves *intrastate* communication service regulated by a state commission. The policy of the Federal Communications Act which is material to the case at bar is stated in section 2(b) of the statute itself (previously quoted under Statutes Involved). That section provides that nothing in the statute shall give the Federal Communications Commission jurisdiction over charges, etc., "for or in connection with *intrastate communication service by wire or radio of any carrier*" (italics ours).[5]

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[5]It may be added that section 3(e) of the Communications Act (also quoted under Statutes Involved) recognizes the significance of regulation by a state commission by providing that "Interstate

At page 13 appellants say that the Federal Communications Act

> "• • • incorporates and applies to radio communications as well as 'apparatus and devices' the antitrust laws' prohibitions on trade restraints and monopolization, and expressly directs the Federal Communications Commission to enforce against common carriers the Clayton Act's ban on exclusive and tying arrangements."

The above statement is pointless as applied to the present appeal. No contention about tying arrangements was made below: further this case obviously involves no tying arrangements, and further still, under express findings below, there never has been any unfair competition by the Telephone Company and the order below involves no tendency toward monopoly. In its sweeping generality appellants' statement is, moreover, inconsistent with the recent decision in *United States v. Radio Corporation of America* (Oct. Term, 1958, No. 54, Feb. 24, 1959) 27 U.S. Law Week 4179, 4182, where this Court said:

> "Thus, the legislative history of the Act reveals that the Commission was not given the power to decide antitrust issues as such, and that Commission action was not intended to prevent enforcement of the antitrust laws in federal courts."

3. The case does not present a substantial federal question under the consent decree.

We have stated the alleged conflict between the consent decree and the order below (supra 9-12)—appellants as-

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communications • • • shall not • • • include wire or radio communication between points in the same State", even though the message goes through places outside the State "if such communication is regulated by a State commission."

serting that the decree prohibits Pacific from engaging in the service covered by its tariff, whereas Pacific contends that there is no such prohibition because the charges for the service are subject to public regulation (supra 10).

Appellants are not parties to the consent decree. They invoked it presumably in order to eliminate Pacific as a competitor—this notwithstanding that the burden of their argument on almost every page is the maintenance of unrestricted competition. The "internal inconsistencies" of such a position were noted by the Commission below—"On the grounds of preserving competition they seek to bar a competitor from the field" (Cal.Comm. 20).

The important point here, however, is that the dispute as to the meaning of the consent decree has never been submitted to the district court which made the decree, notwithstanding the provision therein for reserved jurisdiction (sec. XVII), a provision to which appellants do not refer. We submit, therefore, that the interpretation of the consent decree is not a proper subject for argument here. There is no basis, we submit—and certainly appellants have cited no authority—for asking this Court, as a matter of first impression, to interpret a decree of a federal district court on a question never presented to the district court, but over which it still retains jurisdiction (see *U.S. Gypsum Co. v. Nat. Gypsum Co.* (1957) 352 U.S. 457, 464).

We will say that, in our view, there is no specific language in the decree which states what appellants say the decree means—and this apparently was the view also of the California Supreme Court (Cal.Sup.Ct. 11-13), the California Commission (Cal.Comm. 21-22) and the Federal Communications Commission (quotation, supra 11-12).

But, in any event, and as noted below (Cal.Sup.Ct. 12-13), there has been no authoritative federal determination of the question of interpretation. In such a situation, we submit, the consent decree affords no basis for overruling the decision below.

D. There is no merit in arguments made by appellants.

Appellants' arguments are, we submit, answered by things already said but we offer the following further comments.

Appellants state that the first of "the questions presented" is (Jur.St. 4):

> "(1) Whether a state agency can exempt a corporation from the prohibitions of a judicial decree of the United States enforcing the federal antitrust laws."

There is no such question. Neither the California Commission nor the Supreme Court of California undertook to exempt anybody from the antitrust laws, and most certainly would not make any absurd claim of jurisdiction to do so. Appellants' statement of such a question is, we submit, completely irresponsible and of the same character as certain other statements in appellants' argument; for example, that which characterizes the decision below as "letters of marque, in the guise of public utility status, permitting a monopoly to prey on its independent competitors" (Jur.St. 19).

Appellants assert that Pacific brought about "voluntary or procured" regulation (Jur.St. 15). The statement is immaterial, the issue being the legality of the order below. The fact is, however, contrary to appellants' assertion, Pacific resisted the Commission's assumptions of juris-

diction in 1954 and 1955 (supra 7-8), and while complying with the Commission's orders, did so under protest (Cal.Comm. 14-15, 22). The 1956 tariff here involved was filed after these earlier assertions of jurisdiction by the Commission, and the Commission said in the present case that its decision taking jurisdiction involved adherence to "our earlier view" (Cal.Comm. 14).

Throughout their argument appellants disregard the findings. Thus arguments about monopoly appear on almost every page, but there is nowhere any reference to the contrary findings on this subject (supra 8-9, 17-18), much less any record references or quotations to show that such findings were unsupported.

VI.

CONCLUSION

We respectfully submit that the appeal should be dismissed. Treating the papers on appeal as a petition for certiorari, we submit that certiorari should be denied.

Dated: March 24, 1959.

ARTHUR T. GEORGE,
EUGENE M. PRINCE,
FRANCIS R. KIRKHAM,
Attorneys for Appellee The Pacific Telephone and Telegraph Company.

(Appendix Follows.)

Appendix.

Appendix

Before the Public Utilities Commission of the State of California

Decision No. 54438

Investigation and suspension on the Commission's own motion of Schedule No. 108-T of The Pacific Telephone and Telegraph Company filed by Advice Letter No. 6371.	Case No. 5754

[Appearances and List of Witnesses are set forth in Appendix A which is omitted in this printing]

INTERIM OPINION

Nature of Proceeding

This is an investigation inaugurated April 24, 1956, on the Commission's own motion, into the proposed rates and conditions applicable to private mobile communication systems furnished on a lease and maintenance basis by The Pacific Telephone and Telegraph Company, hereinafter referred to as Pacific.

Heretofore, Pacific has made a tariff offering of public mobile radio telephone service whereby a subscriber could place a telephone call through a control office to a person in a motor vehicle, and vice versa. It represents that it is a popular and useful service. Thereafter, Pacific

had inquiries about the possibility of providing such facilities on a private basis, that is, where subscribers would not have to call through a central office or wait for other calls, but could keep in touch with motor vehicles at any time.

In response to these inquiries, beginning in 1948, Pacific started on an experimental basis to enter into contracts under which it would furnish and maintain all of the equipment and facilities for the subscriber's use and operation under license from the Federal Communications Commission, hereinafter referred to as F.C.C. Pacific represents that the trials were successful and that the number of contracts grew. Copies of these contracts are filed with the Commission pursuant to Decision No. 50837 under Application No. 33935, Case No. 5570, dated December 7, 1954. Pacific now considers that it has sufficient experience as to the equipment, costs of installation and maintenance to warrant the filing of tariffs containing a definitive statement of the terms, conditions and charges upon which the service would be available generally. It contends that, with the number of inquiries now being received from the public, such a tariff is necessary and appropriate in the interests of speedy and efficient service.

Accordingly, on March 30, 1956, Pacific filed the tariff involved here, Schedule No. 108-T, to become effective on April 30, 1956. On April 10, 1956, the Commission by Resolution No. T-3270 granted authority to make said tariff schedule effective on April 30, 1956.

Before the tariff became effective, the City of Los Angeles and a group of concerns and persons engaged in

the installation and maintenance of private mobile radio systems filed petitions for rehearing, contending among other things, that the services proposed to be rendered under the tariffs are not public utility in character and that the filing is an attempt to circumvent the Consent Decree[1] under which Pacific, as a subsidiary of American Telephone and Telegraph Company, was enjoined from engaging in any business other than the furnishing of common carrier communication service. These petitions indicated the need for investigation by the Commission and, accordingly, the operation of Schedule No. 108-T was suspended and public hearing was scheduled.

Public Hearing.

After due notice, a public hearing was held before Commissioner Ray E. Untereiner and Examiners Wilson E. Cline and Manley W. Edwards on the following days and at the following places: July 30, October 17, 18, 19, and 31, and November 1 and 2, 1956, in San Francisco, and October 24 and 25, 1956, in Los Angeles. The testimony was concluded on November 2, 1956, and the parties were granted permission to file concurrent briefs not later than December 21, 1956. Briefs have been filed and the matter is ready for decision. During the course of hearing requests were made for a proposed report by the presiding officers and objection thereto was filed by Pacific. In our opinion, all parties have stated in their briefs substantially everything that they would raise in the way of exceptions to the proposed report. Such requests are hereby denied.

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[1] *United States of America v. Western Electric Company, Inc.* and *American Telephone and Telegraph Co.*, Civil Action No. 17-49 in the United States District Court for the District of New Jersey, January 24, 1956.

On January 16, 1957, counsel for Pacific filed a motion to strike the parts of the brief filed by Joseph E. Keller on behalf of himself and the Petroleum Industry Electrical Association beginning with the last paragraph on page 2 to and including page 12, line 1. Said motion is hereby granted on the grounds that these portions of the brief pertain to matters which are not of record and which are irrelevant and immaterial to any issue in the proceeding.

Nature of Testimony

At the outset of the hearing Pacific listed the issues as: (1) Is a tariff filing appropriate at this stage of development of this service, and (2) Are the charges, terms and conditions set forth in the tariff reasonable and proper and not discriminatory or preferential. It then proceeded to present three witnesses to explain: (1) the tariff and the development of the service, (2) the basis of the charges, and (3) that the continuation of this service will not burden or adversely affect the remainder of its public utility undertaking.

The protestants and interested parties viewed the matter as of much more importance and far reaching effect than Pacific did and proceeded to question the utility status of this service, to question the offering of this service by a large telephone company as providing unfair competition to small private business concerns and to question whether this is a proper activity for a telephone utility to engage in.

The Proposed Tariff

Schedule 108-T provides rates, charges and conditions for private mobile radio telephone systems furnished on

a lease and maintenance basis by Pacific. It offers the most generally used equipment items at stated rates when such items are provided under normal conditions. It also contains provisions for furnishing equipment at charges based on estimated cost for special equipment and arrangements not specifically covered in the schedule. It provides that the station licensee will be responsible for securing from the F.C.C. the necessary authorizations for the communication system and such operative personnel as may be required by the rules of the F.C.C. Such service will be furnished to persons or organizations other than communication common carriers, licensed by the F.C.C. in the Maritime, Aviation (not including aircraft stations), Public Safety, Industrial, Land Transportation or Citizens Radio Services. It also provides that the station licensee shall have exclusive control of the communication facilities and shall have full responsibility for their use and operation in accordance with F.C.C. rules. In addition to limitations as to liability, provisions as to minimum charges, basic termination charges, location of land stations and mobile stations are provided.

As examples of the proposed tariff rates, for a low power land station the monthly rate is $28; for a high power land station the monthly rate is $74; and for a mobile station the monthly rate is $20. In addition, rates for such items as antennas, poles, control consoles, push-to-talk hand telephones, control relays and other items are provided. The land station equipment is subject to a basic termination charge which reduces at the rate of 1/60 each month. The mobile station equipment and supplemental equipment are subject to installation charges.

Pacific's first witness testified that the charges set forth in Schedule No. 108-T are generally the same as those now being charged in the present contracts, except for a few minor increases and decreases. Likewise, he testified that the conditions set forth in the proposed schedule are essentially the same as those now included in contracts for furnishing private mobile telephone service. A copy of the proposed Schedule No. 108-T is included in the record as Exhibits Nos. 1 and 1-B and illustrative forms of contracts as Exhibits Nos. 2 and 2-A.

Service Development

As has been previously mentioned the number of contracts by Pacific for private mobile communication systems has grown since the start in 1948. As of April 30, 1956, the number had grown to 214 in the State of California. Exhibit No. 3 shows the following growth trend:

	Number of Contracts	
Year	Made During Year	Cumulative Total
1948	2	2
1949	0	2
1950	1	3
1951	0	3
1952	0	3
1953	5	8
1954	64	72
1955	115	187
1956	27	214

Applicant's first witness testified that these 214 contracts represent less than 4.5 percent of the total private mobile base stations licensed in the State of California. As of April 30, 1956, these contracts covered 1,702 private mobile units and currently many new parties are seeking

these private systems. This witness indicated that 225 inquiries are on hand for these private systems.

In view of the apparent large unsatisfied demand for this private service, inquiry was made of the witness as to the reason why this service could not be handled by the regular public mobile telephone service being offered by Pacific. The reply was that as nearly as he could determine none of those making inquiries can be served satisfactorily by public mobile service because such parties generally have a requirement for calling within their own organizations or between their own units. For such purposes, public mobile service is not satisfactory. The public mobile telephone is subject to the delay of waiting for a channel, if the channels are busy, and to the delay arising from the necessity of placing the call through an operator.

This witness also testified that as of September 30, 1956, there were 1,412 mobile stations in the public mobile system and as of that date Pacific was holding orders for an additional 3,397 mobile units.

Quality of the Service

A number of parties which were receiving private mobile radio-telephone under contracts with Pacific, upon learning of the fact that the Commission was investigating this service, took the trouble to make appointments, appear, and present testimony at the hearing regarding the quality of the service. An even larger number wrote letters about the service to the Commission. Almost universally they asserted that the service rendered by Pacific was very satisfactory, that maintenance service was available generally on a 24-hour basis and that the rates

charged were reasonable. All desired that the service be available and continue in the future.

Principal Issues

After analyzing the extensive record in this proceeding, the principal issues in the Commission's opinion are:

1. Is the offering by Pacific to furnish mobile communication equipment on a lease and maintenance basis without discrimination to persons authorized to operate private mobile communication systems an offering of public utility service by a telephone corporation under the provisions of the California Constitution and the Public Utilities Code?

2. Does Section 851 of the Public Utilities Code require Pacific to obtain the authorization of this Commission to lease mobile communication equipment to persons authorized to operate private mobile communication systems?

3. Does the Federal law preclude this Commission from regulating the rates charged by a telephone corporation for leasing and maintaining mobile communication equipment to persons authorized to operate private mobile communication systems?

4. Would the authorization of tariff rates for private mobile communication service provide unfair competition to small businessmen offering similar services on a contract basis, contrary to the intent and purposes of the Consent Decree?

5. Should the Commission assume jurisdiction over the private operators in this business?

6. Will the continuation of this service be deleterious to the regular communication service furnished by Pacific?

7. Are the proposed rates at a reasonable level for the type and quality of service being rendered?

Issue 1—Public Utility Service by a Telephone Corporation

Pacific represents that its corporate purposes and powers as set out in its articles of incorporation are sufficiently broad to include the furnishing of private mobile communication systems on a lease and maintenance basis. It also represents that it is not limited to "land lines" in conducting its telephone business. Pacific states that while it does in fact own and operate many miles of land or wire lines, it has performed telephone service by radio in California for many years and much of its present communication network in California consists of radio equipment and channels used for point-to-point as well as mobile communications that radio has been used in its telephone business since 1921 and at the present time it operates about 350,000 toll circuit miles of microwave in California; that ordinary toll service goes as much by radio as by land lines; and that radio is also used for such diverse services as rural subscriber lines, coastal harbor service and highway service.

Pacific states that as a corporation owning and furnishing "telephone lines", i.e., private mobile communication systems, it operates as a telephone corporation as defined in Section 324 of the Public Utilities Code.[2] Section

[2]Section 234 of the Public Utilities Code provides:
"'Telephone corporation' includes every corporation or person owning, controlling, operating, or managing any telephone line for compensation within this State."

233 of the Code defines "telephone line" as including "all conduits, ducts, poles, wires, cables, instruments, and appliances, and all other real estate fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate communication by telephone, whether such communication is had with or without the use of transmission wires."

Pacific also states that all telephone corporations are not necessarily public utilities, but a telephone corporation which offers service to the public is declared to be a public utility by Section 23 of Article XII of the California Constitution[3] and by Section 216 of the Public Utilities Code.[4]

In furnishing private mobile communication systems on a lease and maintenance basis, Pacific states that it qualifies as a public utility both on the ground that it is furnishing a service and on the ground that such service is offered to the public.

Protestants held a different view and one witness insisted that the leasing and maintaining of inert radio equipment for F.C.C. private mobile station licensees is

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[3]Section 23 of Article XII of the California Constitution provides in part as follows:

"Every private corporation and every individual or association of individuals, owning, operating, managing or controlling any • • • plant, or equipment within this State • • • for the transmission of telephone or telegraph messages • • • either directly or indirectly, to or for the public • • • is hereby declared to be a public utility subject to such control and regulation by the Railroad Commission as may be provided by the Legislature, • • •."

[4]Section 216(a) of the Public Utilities Code provides in part:

"'Public utility' includes every • • • telephone corporation • • • where the service is performed for or the commodity delivered to the public or any portion thereof."

neither a telephone service in fact nor within the intendment of the Public Utilities Code. He cited a recent decision of the California Supreme Court in the Television Transmission Case[5] wherein the issue was whether the coaxial antenna service constituted a telephone service, i.e., the operation of a "telephone line" as defined in Section 233 of the Code. He stated the Court concluded that a company does not operate a telephone line and is therefore not a telephone corporation unless such control, operation and management are in connection with or to facilitate communication by telephone, and further that the service petitioner rendered was not communication "by telephone" within the meaning of the Code.

Pacific also cited this case and stated the Court drew a distinction between television broadcasting and telephony quoting: "* * * in telephony one may carry on a two way conversation by speaking as well as listening * * *." Pacific represents that private mobile systems are telephone systems, since they consist of transmitters and receivers for carrying on two-way voice communication between land stations (sometimes called base stations) and mobile stations.

Another party stated these activities are not telephone service, but are equipment service, and the mere leasing, installation or maintenance of radio equipment for private mobile radio or any combination of these activities, without the ability to furnish the channel upon which such equipment is used, bear no indicia of the monopoly char-

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[5]*Television Transmission, Inc. v. Public Utilities Commission*, 301 P. 2d 862 (Cal. Sup. Ct., 1956).

acteristics of telephone service.[6] Quite the contrary, he states, the leasing installation and maintenance of equipment for private mobile radio is in fact a highly competitive industry in which over 100 persons are directly engaged in the State of California alone.

Pacific advanced a different view, stating there is nothing unusual in the fact that regulated public utilities and unregulated enterprises may be furnishing the same or a similar type of service in the same locality at the same time. In the absence of an exclusive franchise a public utility has no right to be free from competition; and by the same token it is fundamental to our competitive system that unregulated businesses have no right to freedom from competition, so states Pacific, and it cites two cases[7] outside of California. Competition between municipal utilities not subject to the jurisdiction of this Commission and public utilities in this State are not uncommon. Pacific indicates that dedication of its property to public service subjects it to Commission regulation and states that by submitting to regulation of the Commission it has voluntarily dedicated its private mobile facilities and business to a public use, citing several cases.[8] In this connection it should be pointed out that the selection of the persons who

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[6]This party stated: Perhaps the outstanding indicia of telephone service is the necessity that it be a monopoly in a given geographical area and cited: *California Fire Proof Storage Company v. Brundige*, 199 Cal. 185, 189).

[7]*Tennessee Power Co. v. T.V.A.* (1939) 306 U.S. 118; *Alabama Power Company v. Ickes* (1938) 302 U.S. 464.

[8]*Palerino L. & W. Co. v. Railroad Commission* (1916) 173 Cal. 380, 384; *Franscioni v. Solidad Land and Water Co.* (1915) 170 Cal. 221, 227; *Stunson Lumber Co. v. Kuykendall* (1927) 275 U.S. 207, 212.

fall within the portion of the public to which the service is offered will be made by the F.C.C. and not Pacific.

Pacific represents that it requires no certificate of public convenience and necessity to furnish telephone service, including the leasing and maintaining of private mobile telephone systems, because it acquired the right to engage in that business under its charter granted by the State of California prior to 1912 when certificates, as now required under Sections 1001 and 1002 of the Public Utilities Code, were first required.

If Pacific were not permitted to continue in this business it cited several examples of the adverse effect it would have on the public. Pacific points out that without exception the other suppliers who appeared in this proceeding testified that they reserved the right to refuse service at their option. Pacific is ready to serve the public without discrimination and states that the testimony showed 225 pending inquiries about the service since the matter of tariff filing has been in abeyance—inquiries from government agencies, law enforcement agencies, utility companies, hospitals, service companies, newspapers, labor unions, farmers, food and feed businesses, oil companies, mining companies, taxicab companies, express companies, builders, contractors, lumber companies, banks, warehouses, and a large number of others.

Other types of service considered as "telephone service" and served under filed tariffs which Pacific considered analogous to the private mobile radio service are:

1. "Private leased line" service
2. Local private lines

3. Telemetering service
4. Code calling equipment
5. Loud speaker paging equipment
6. Buzzer equipment

As one answer to the charge that this private mobile telephone service is not appropriate for Pacific as a public utility, it referred to Decision No. 51271 issued by this Commission on March 29, 1955, concerning the sale by the Southern Counties and Southern California Gas Companies of their radio telephone system to Pacific and contracts to lease-back the equipment and have Pacific furnish the maintenance.

In Decision No. 51271 Pacific was not authorized to enter into the arrangement at the rates and prices as proposed, but later was so authorized by Decision No. 51446, however, at a higher annual payment in order not to result in any burden on the regular telephone subscribers of Pacific. Our conclusion at that time was that the proposed service will become a public utility service but that there was insufficient experience to warrant the filing of tariffs. We then pointed out that Pacific's entry into this field was still on an experimental basis, and that it might be a disservice to its telephone ratepayers to require it to file tariffs and offer this service to all comers. However, our conclusions at that time were on a considerably less extensive record than is now before us.

After studying the extensive record we find no reason to change our earlier view. Pacific is definitely a public utility under the California Constitution and the Public Utilities Code; it is not only willing now to dedicate its

mobile communication property to the public service in private automobiles for private as well as public mobile communication service and to file tariffs as required by the Public Utilities Code, but we hereby find that it has in fact so dedicated its property and service.

The Commission finds that Pacific's offering in its proposed Schedule 108-T to furnish mobile communication equipment on a lease and maintenance basis without discrimination to persons authorized to operate private mobile communications systems is an offering of public utility service by a telephone corporation under the provisions of the California Constitution and the Public Utilities Code.

Issue 2—Lease of Necessary or Useful Utility Property

One of Pacific's witnesses testified that the same types of equipment are used in the private mobile radio telephone systems as are used in its regular public mobile radio telephone service offering. Section 851 of the Public Utilities Code provides that "no utility shall sell, lease * * * or encumber the whole or any part of its * * * plant, system or other property necessary or useful in the performance of its duties to the public * * * without first having secured from the Commission an order authorizing it so to do."

Inasmuch as leasing is contemplated of necessary and useful utility property, Pacific is required under the Code first to obtain an authorization of the Commission so to do. In the past Pacific has filed copies of the various private mobile communication contracts with the Commission and has secured Commission authorization, by reso-

lution, before contracts relating to the furnishing of private mobile communication service have become effective. Only in the Southern California and Southern Counties Gas Companies' sale and lease back arrangement did Pacific seek and first obtain an order of the Commission. In looking to the future and the large number of customers that may be involved, it would indeed be cumbersome for the utility to have to obtain a specific authorization of the Commission preliminary to each leasing of mobile communication equipment. The authorization which will be granted to Pacific to file Schedule 108-T as hereinafter modified will constitute the necessary authorization by the Commission for Pacific to lease the mobile communication system equipment.

Our conclusion on this point is that the proposed private mobile communication systems will be composed of necessary or useful utility equipment and the leasing thereof is subject to Commission jurisdiction.

Issue 3—State Regulation of Intrastate Mobile Communications

Some of the protestants pointed out that radio transmissions are not respective of geographical boundaries and some of the signals will undoubtedly traverse state lines. This condition could exist. The Federal Communications Commission has regulatory authority in respect to rates and charges for interstate communications and international communications. However, the provisions of Sections 2(b) and 3(c) of the Communications Act of 1934 as amended (47 U.S.C. 152 and 153), make it clear that the Federal Communications Commission has no jurisdiction, except under the radio licensing provisions of

the Act, over intrastate communication service by radio and that "interstate communication by radio" does not include communication between points in the same state, if such communication is regulated by a State Commission.

The private mobile telephone communication with which we are here concerned involves communication between points within California. We have concluded that the rates to be charged by Pacific for its services in connection with such communication are subject to regulation by this Commission. The federal law clearly does not preclude such regulation.

Certain parties suggested that private mobile licensees obtaining their equipment from Pacific on a lease and maintenance basis do not have control of the equipment as required under the F.C.C. rules. While most of the parties leasing equipment from Pacific preferred that the technical adjustment and maintenance be performed by Pacific's technicians, it appeared that technically these parties had control of the equipment. Even if they did not, that is a matter for the F.C.C. to deal with and is not an issue within our province.

Issue 4—Unfair Competition and the Consent Decree

A Congressman from California, appearing as the representative of Subcommittee 5 of the Small Business Committee of the House of Representatives, stated: "It appears that the filing of tariffs definitely reflects unfair competition to the many small businessmen of our state." He was familiar with the Consent Decree (Supra Note 1) and continued: "Under the Decree, the American Telephone and Telegraph Company, Western Electric and

their subsidiaries are forbidden to engage in any business other than the furnishing of common carrier services, yet that term is defined in such manner that the small businessman in the private communication service will be afforded little actual protection." He charged that the strategy is for the telephone companies, whose private communication services were not then subject to regulation, to file tariffs with the various state commissions in order to bring them within regulation and so exempt those operations from the prohibitions of the Decree.

He also indicated that not only does the Consent Decree fail to accomplish what the government endeavored to do seven years ago, but it actually assists big business to the detriment of the independent and small businesses. He contended that by that decree the monopoly position of the applicant may be even further extended into the area of private communications. He gave his considered opinion that the free enterprise system of our country and the over-all benefit of all California citizens will best be protected by denying the present tariff filing of the applicant.

Counsel for Pacific responded and stated that there is no substance to this charge of unfair competition because the telephone utility must offer the service at a fixed rate while all other concerns, including the small businesses in which the Congressman is interested, are free to undertake the utility if they see fit, and if the customer wishes to take the lower bid he is free to do so. He also stated that the monopoly protection afforded public utilities is not competitive protection with regard to the furnishing and

maintaining of private mobile communication service and works as a restriction rather than a preference.

Much of the time of the protestants at the hearings was devoted to the voicing of fears and conjectures as to the possible consequences of our accepting these tariffs. The fears were apparently real, and the Commission wanted to place no restrictions on the protestants in the presentation of their views. Much of what was presented in this connection, was, however, not germane to the issues in this case. If the proposed offering of the applicant is a public utility offering of telephone service the law clearly requires that we assume jurisdiction over it whatever the collateral consequences may be. If, in addition, the proposed rates are fair and reasonable, we have no alternative but to accept the tariff offered for filing.

While some of the private operators or their representatives who presented testimony held views somewhat similar to those expressed by the Congressman, several indicated that they could meet and live on the rates being proposed by Pacific. One private operator indicated that the cost of mobile equipment for transmission at frequencies above 400 megacycles is greater than that for lower frequencies and that the proposed rates of Pacific are too low for this higher frequency band.

Others indicated a competitive advantage to the utility because it could offer 24-hour per day maintenance service in its many service shops throughout the State. Certain of these parties contended that Pacific's participation in this business constitutes "unfair competition" and that it will ultimately obtain a monopoly of the business.

Our comments on the fears of the protestants can therefore, be brief. Sincere though they be, they have not been proved in this record to be well founded.

There is a fear that the telephone company will use this service as an entering wedge to secure ultimate control over all wave lengths now devoted to private communications. But this can be done only by order of the F.C.C., which is charged, as truly as is this Commission, with the duty of protecting the public interest. There is a fear that the applicant will get control of all the California mountaintops suitable for the location of base stations. Here again, if the danger should ever become acute there is public authority to deal with unfair business practices. There is a fear that this Commission is being used to subvert the intent of the Consent Decree. But the federal court has continuing jurisdiction and does not need the offices of this Commission either to interpret or to enforce its orders. There is fear that the competition of the telephone company will drive the smaller suppliers of this type of service out of business. Protestants' testimony on this score, however, shows some internal inconsistencies. On the grounds of preserving competition, they seek to bar a competitor from the field. In fearing the competition of Pacific. they assume that it will have insuperable competitive advantages; while, in discussing Pacific's motive in making this public offering, they emphasize the disadvantages which regulation involves.

We are not convinced that Pacific's presence in the field will constitute any threat to the continued vigor of its competitors. It should not, does not propose to, and will not be allowed to favor its own private mobile customers by way of connections with its "land lines" no

allowed to the customers of its competitors. It will be required to maintain charges which are fully compensatory. It will be under the disadvantage of being unable to enter into price competition with its competitors to secure the business of particularly desirable customers; and it will be required to serve customers its competitors may not elect to serve. There is no danger here which would justify our going to the Legislature to ask to be relieved of the duty which the law now imposes upon us to regulate the service.

The Commission finds that competition of regulated companies with the nonregulated, if it is unfair at all, is more likely to be unfair to the regulated rather than to the nonregulated competitors. The record made it clear, and a supplemental filing has given additional assurance, that the applicant will not grant special favors in connection with its regular telephone service to its own mobile telephone customers. In any event, in the Commission's opinion, the public has less to fear from the activities of a "monopoly" when such "monopoly" is fully regulated by public authorities and we fail to find that Pacific will be in a position to compete unfairly with its smaller rivals.

While it was frequently asserted at the hearing that Pacific's motive was to avoid the Consent Decree, there was no proof and the Commission certainly will not take judicial notice of good or bad intentions. In any event, it is for the federal courts, and not for this Commission, to implement their decisions; and the Consent Decree seems specifically to assume that such activities as the one here in contemplation can be rendered by applicant without any injurious effect on the public welfare, so long as such

activities are regulated by state commissions. We believe that, if this is the implication of the Consent Decree, it is a fully justified position. If the federal court had wished to bar such activities by the applicant even though subjected to regulation, it would have made such provision and the question would not be before this Commission. So far as the effect of the Consent Decree is concerned, it is not actually pertinent to the issues in this case. If the proposed service would be utility service in the absence of that decree, it is still utility service. If we held this service to be utility in nature in the gas company cases before the Consent Decree, there is nothing in the Consent Decree to prompt us to change our holding. If our previous holding that this service is utility in nature, distasteful to Pacific at the time it was made, now turns out because of the Consent Decree to be beneficial to the applicant, that in no wise affects the validity of our previous holding.

It is to be noted that, with the exception of the City of Los Angeles, all protestants were or represented other operators in the private mobile radio telephone field. Their own convenience would be served by the elimination of a competitor.

The members of the using public who appeared or contacted the Commission by correspondence, including both present and prospective patrons of applicant's private mobile service, were unanimously and vigorously of the opinion that applicant's service in this field is excellent, reasonably priced, and needed. No one else has offered the service to all comers on equal terms and some of the witnesses testified they could not get satisfactory service

except from applicant. From the mere fact that no other supplier offers the service as a public utility, obliged to serve all qualified applicants without discrimination, the danger is inevitable that, in the absence of applicant's service, some who need this type of service could not get it. Certainly they would have no one from whom they could demand it as a matter of right, as they can from applicant if this tariff is accepted for filing. Being convinced by the record of the importance of this service to those who need it, we cannot escape the conclusion that public convenience and necessity require us to authorize the applicant to supply it.

Issue 5—Jurisdiction over Private Operators

Some protestants contend that if the Commission regulates private mobile communication service furnished to the public by Pacific, it must necessarily regulate all companies or individuals which lease and maintain private mobile communication systems. Pacific states that in the first place, it is fundamental that a regulatory Commission cannot reach out to regulate, as a public utility, an enterprise which has not dedicated its property to the public service as the Constitutions of this State and of the United States guarantee freedom from regulation as a public utility in the absence of such dedication. In this regard Pacific cites several cases [9]

[9] *Frost Trucking Co. v. RR Com.* (1926) 271 U.S. 583; *Souza v. Public Utilities Com.* (1951) 37 Cal. 2d 539, 542-543; *Samuelson v. Public Utilities Com.* (1951) 36 Cal. 2d 722, 732-833; *Cudahy Packing Co. v. Johnson* (1939) 12 Cal. 716, 721-722; *Story v. Richardson* (1921) 186 Cal. 162, 167; *Richardson v. Railroad Commission* (1923) 191 Cal. 716, 721-722; *Associated Etc. Co. v. Railroad Commission* (1917) 176 Cal. 518.

Those persons and companies, other than Pacific, providing private mobile communication systems on a lease maintenance basis, which offered evidence on the subject of dedication denied any intention of dedicating their systems to the public. Each of them reserved the right to refuse to deal with certain members of the public. Most of the private individuals or companies in this business serve within a small or restricted area whereas Pacific's proposed area covers practically the entire state. The record shows that Pacific is competing with many of these other parties in these small or restricted areas.

The question as to whether or not the Commission should assume jurisdiction over other private mobile operators is not in issue in these proceedings. The basic difference between the service offered by the telephone company and that offered by its competitors is that the telephone company now offers to render service on the same basis to all qualified applicants for such service. If and when any of the other companies hold out their service to the general public (or to such portion of the public as can qualify for it) they will undoubtedly assume public utility status as telephone companies, and will subject themselves to regulation. Until that happens, we shall have no authority to regulate them. It is only public telephone companies offering to serve the public and not private operations of a telephone nature that are within our jurisdiction. Our conclusion on this issue is that, until there is evidence that these private persons or companies, other than Pacific, have dedicated or are willing to dedicate their service to the public, we have no authority to and should not attempt to regulate them.

Issue 6—Effect on Pacific's Regular Communication Service

A witness for the Commission staff prepared Exhibit No. 18 for the purpose of entering into the record the current situation regarding held orders (as of September 30, 1956) in Pacific's service territory. The held orders and held regrade requests for the years 1953 through 1955 and the first three quarters of 1956 follow:

End of Quarter	Held Orders	Held Regrade Requests
1953—First	97,372	88,649
—Second	90,534	83,176
—Third	81,310	86,670
—Fourth	54,345	75,450
1954—First	47,413	63,953
—Second	40,367	38,470
—Third	34,824	37,777
—Fourth	20,279	32,083
1955—First	27,292	31,900
—Second	27,958	32,085
—Third	28,441	37,353
—Fourth	29,061	47,596
1956—First	33,289	53,155
—Second	30,550	64,223
—Third	23,878	73,331

The significance attached to these figures by the witness was that as of September 30, 1956, there were 97,209 applicants for service that Pacific either has not been able to provide with service or has not been able to provide with the grade of service they desire. This is a larger number than has occurred at any time since the first quarter of 1954. The bearing of these facts upon the proposed Tariff 108-T is that mobile radio service, in his opinion, competes with Pacific's primary obligation, that is, the rendering of normal telephone service, for money

for new construction, management time and engineering time.

The staff recommended that the Commission permanently suspend Tariff Schedule 108-T because Pacific is not and has not been providing telephone service on a current basis. The staff further recommended that Pacific devote its full efforts towards fulfilling its basic utility obligations; and that Pacific not be permitted to serve new private mobile customers until such time as its held order and regrade situation is on a current basis as defined in Decision No. 53312 of this Commission.

Pacific's witness held a different view and testified that if all of the management and engineering time and money and material devoted to private mobile telephone service were devoted to clearing held orders, no held order could or would be cleared any sooner than it can and will be cleared under Pacific's present plans. He stated the real problem is the unpredictable nature of telephone demand and unforeseen shifts in population growth and movement, which in some instances require a planning and construction interval of eighteen months to two years before telephone plant can be ready for use.

The California Farm Bureau Federation supported Pacific's position in this matter and stated that of the 33,000 unfilled primary service orders as of April 30, 1956, two-thirds were less than three months old, and that in 300 out of the 491 centers the held order problem for primary service is susbtantially nonexistent. At page 8 of Exhibit No. 18 it is established that the held order problem is concentrated in three areas—San Jose, Sacramento and Orange County. The Farm Bureau concludes that the

diversion of Pacific's capital and personnel from all other classes of service to concentrate on the reduction of the number of held orders would not accelerate to any marked degree the results of the efforts currently devoted to the filling of primary service orders on a current basis.

Our conclusion on this issue is that we cannot say with certainty that Pacific's activities in the private mobile telephone field do not delay, to some extent, the fulfillment of the public's request for new telephone service or upgrading of service. The primary obligation of The Pacific Telephone and Telegraph Company is the provision of basic exchange and toll telephone service in the territory in which Pacific furnishes that service as a monopoly. While we are impressed with the importance of private mobile communication service to the public, a substantial portion of the public may obtain such service from organizations other than Pacific. In the territory served by Pacific, basic telephone service can be obtained from no other source. Considering all the circumstances, we are nevertheless of the opinion that no restrictions other than those herein provided should be placed on the offering of private mobile service at the present time.

Issue 7—Rate Level

Pacific's estimated operating results under the proposed rates are set forth in Exhibit No. 5 and indicate that the rate of return is 6.8 percent. The Commission staff studied this matter and introduced Exhibit No. 21 which indicates that the proposed revenues do not cover all of the expenses and the resulting rate of return is a red figure of 3.0 percent. These two analyses in summary form are:

	Pacific's Exh. No. 5	Staff's Exh. No. 21
Revenues (Estimated Annual Basis)	$ 638,125	$ 638,125
Expenses and Taxes		
Maintenance	165,668	355,077
Depreciation	175,907	175,907
Traffic	---	---
Commercial and General Expense	105,752	105,752
State and Federal Income Taxes	70,043	---
Other Taxes	38,063	38,063
Total Expenses and Taxes	$ 555,433	$ 674,799
Net Revenue	$ 82,692	$ (36,674)
Telephone Plant in Service	$1,668,129	$1,668,129
Depreciation Reserve	453,214	453,214
Net Telephone Plant	$1,214,915	$1,214,915
Rate of Return	6.8%	(3.0)%

(Red Figure)

The main difference between the two estimates is in the items of maintenance expense and the related income tax. The staff had investigated the maintenance arrangements of Pacific and came to the conclusion that the unit maintenance costs for mobile and base stations used by Pacific in developing Exhibit No. 5 are substantially lower than those actually experienced by Pacific. Exhibit No. 21 represents the efforts of the staff to appraise the operations cost showing of Pacific and to make adjustments to the extent that Pacific's figures permitted the staff to do so. The staff's analysis indicates a loss from private mobile operations.

The staff also recommended permanent suspension of Schedule 108-T because the rates proposed therein are not compensatory and therefore the private mobile telephone

service will be a burden to the general ratepayer. The staff further recommended that at such time as Pacific is on a current basis with respect to held orders, and if the Commission finds this a proper field of activity for Pacific, it could then file proposed rates based on costs supported by the separate records. In making its study, the staff had determined that Pacific does not maintain separate records on all of its private mobile costs but keeps them jointly with the public mobile communication costs.

The maintenance expenses developed from actual experience by the Pacific Company in its Exhibit 9, for the year 1955, reflect approximately the same level of unit maintenance expenses as those used by the staff in its estimates. However, one of Pacific's witnesses testified that it was his opinion that the maintenance costs used by the Commission staff were invalid because they were based on certain accounting information without an analysis of the infirmities of that information for this purpose. He testified that the accounting information used by the staff did not represent the going level of expense since it reflected abnormally high training costs during a period of extremely rapid growth and also included susbtantial costs of converting the existing systems from 6 to 12 volt batteries. Pacific's position is that the staff's results of operations study was based on a past period and is not indicative of the lower costs that will be experienced in the future for this service. Pacific states that the proposed rates are not only compensatory but they are about the same as the rates of its competitors.

Pacific agreed to revise Section D of Schedule 108-T in accordance with a recommendation of the staff. This sec-

tion, which specifies rates on a cost basis for special equipment not named in the tariff, will, in its revised form, provide for review by the Commission prior to such rates becoming effective, to insure against any preferential or discriminatory treatment of customers. Pacific also revised the proposed tariff by adding a condition (Exhibit No. 1-B) which, carrying out its existing practice, expressly precludes discrimination in the matter of interconnection of private mobile equipment with the general exchange and toll switching system of Pacific, as between Pacific's private mobile customers and those of its competitors.

The issues in this matter were fought primarily on jurisdictional grounds and the interested parties had virtually nothing to offer as to the adequacy of the proposed rates. The Commission's opinion is that Pacific's showing was more convincing than that of the staff. Also, there is evidence that the competing companies charge about the same rates as those proposed except, perhaps, for the higher frequency stations; and that they find those rates adequate. Moreover, in the absence of a convincing showing, the Commission is reluctant to require a utility to charge a higher rate than in its judgment is necessary.* Except for the very highest frequency, which is still more or less in the experimental stage,* we can adequately protect the public by placing Pacific on notice that it will be required to keep adequate and accurate records of the separate costs of the service by frequency bands so that we

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*[There is apparently a typographical error here. The sense of the text indicates that the sentence should end after the word "stage" rather than after the word "necessary".]

may, in any future rate proceedings, be sure that the regular telephone subscribers are not being required to make up any deficits.

Findings and Conclusions

Based upon a consideration of the evidence, the Commission finds and concludes:

1. That Pacific is a telephone corporation and a public utility.

2. That the private mobile communication systems and service now furnished under contract by Pacific and proposed in Tariff Schedule No. 108-T constitute a telephone line and public utility telephone service, under the provisions of the Constitution and the Public Utilities Code; and that Pacific has dedicated the same to the public.

3. That the private mobile communication equipment is necessary or useful in Pacific's performance of its duties to the public and the leasing of such equipment is subject to Commission jurisdiction as provided in Section 851 of the Public Utilities Code.

4. That the Commission under Sections 455, 728 and 729 of the Public Utilities Code has the power to establish rates for private mobile communication systems in lieu of contracts.

5. That the Commission under Section 455 of the Public Utilities Code has the power to accept, alter or permanently suspend the proposed rates or to establish other rates which it finds to be just and reasonable.

6. That the proposed rates, except for a revision of Section D relating to Special Equipment and Arrangements of Schedule No. 108-T, and the inclusion of Condition II, Exhibit No. 1-B, as hereinbefore mentioned, and except for the frequency range of 400-470 megacycles, are just and reasonable; that Pacific should be required to revise said Section D as provided in the order hereof, to add to Schedule No. 108-T the Condition in Exhibit No. 1-B, and to apply a 10 percent surcharge on the rate per month for land stations and for mobile stations where the frequency of operation is within the frequency range of 400-470 megacycles pending further study and accumulation of separate costs by frequency bands on this service; and upon Schedule No. 108-T being so revised and supplemented that the suspension should be lifted.

INTERIM ORDER

The Commission having on April 24, 1956, instituted investigation of Schedule No. 108-T of The Pacific Telephone and Telegraph Company and having suspended said schedule until August 28, 1956, and on August 21, 1956, having extended the suspension for a period six months beyond August 28, 1956, public hearing having been held and the Commission being of the opinion that the rates should be authorized on an interim basis pending further analysis of the costs; therefore,

IT IS HEREBY ORDERED that:

1. The suspension of operation of said Schedule No. 108-T filed by Advice Letter No. 6371 is lifted subject to the following conditions:

a. Pacific shall revise Schedule D on Original Sheet 9 to read: "For special equipment and arrangements not specifically covered in this schedule, charges equivalent to the estimated cost of furnishing such equipment and arrangements apply, subject to prior review of such charges by the Public Utilities Commission of the State of California. (Includes use of housing, power, and antenna support to the Telephone Company's radio sites, and provision of amplitude modulated (AM) equipment.)"

b. Condition 11, set forth in Exhibit 1-B, shall be added to Original Sheet 17 of Schedule No. 108-T.

c. Pacific shall file a supplemental rate tariff sheet or revise the filing in such manner as to provide a 10 percent surcharge on the monthly rate applicable to land stations and to mobile stations where the operating frequencies are in the range 400-470 megacycles.

2. Pacific shall augment its accounting records in such manner as to keep separate memoranda that will permit it to develop the complete capital, revenue expenses, net revenue and rate of return on a depreciated rate base for its private mobile communication systems by frequency bands in the future.

3. Pacific shall make and file reports with the Commission at six-month intervals, the first report being based on the six-month interval ending August 31, 1957, and filed within forty-five days thereafter, showing revenues received from and summarizing the cost of providing private mobile communication systems by frequency bands, and continue making such reports until final order by the Commission in this proceeding.

4. The Commission retains its jurisdiction in this matter pending filing of the reports and the determination by the Commission of the proper final rate levels for the private mobile communication service.

5. Pacific shall give persons now receiving private mobile communication service under filed contracts the option of continuing to receive such service under the provisions of such contracts for a term not exceeding five years or of terminating such contracts at any time and thereafter receiving service under the filed tariff.

6. The effective date of this order shall be twenty days after the date hereof.

Dated at Los Angeles, California, this 29th day of January, 1957.

Peter E. Mitchell,
President,
Ray E. Untereiner,
Matthew J. Dooley,
Rex Hardy,
C. Lyn Fox,
Commissioners.

(Appendix A omitted.)

FILE COPY

Office-Supreme Court, U.S.
FILED
APR 13 1959
JAMES R. BROWNING, Clerk

No. 719

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

COMMERCIAL COMMUNICATIONS, INC., ET AL.
AND
WATSON COMMUNICATIONS SYSTEMS, INC., ET AL.
Appellants
vs.
PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA
AND
PACIFIC TELEPHONE AND TELEGRAPH COMPANY

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

OPPOSITION TO MOTIONS BY THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA AND THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY TO DISMISS APPEAL

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April 13, 1959.

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IN THE

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AND

PACIFIC TELEPHONE AND TELEGRAPH COMPANY

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

OPPOSITION TO MOTIONS BY THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA AND THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY TO DISMISS APPEAL

Preliminary Statement

The separate motions to dismiss filed by the California Public Utilities Commission and the Pacific Telephone and Telegraph Company do not overcome the federal issues of paramount public importance raised by the divided decision of the California Su-

preme Court. In essence, the majority opinion by four Justices authorized the Telephone Company to invade the private radio leasing and servicing business, while the three minority Justices feared that this would create "a tendency to promote monopoly in a field of business operation which is and should remain in the realm of free enterprise." (Juris. St., p. A19).

As detailed in appellants' Jurisdictional Statement, the majority ruling below (1) contravenes the injunction of a federal antitrust decree which, as repeatedly confirmed by the United States Department of Justice, prohibits the extension of the telephone monopoly into the competitive area of private mobile radio;[1] (2) clashes with the provisions of Title III of the Communications Act for the competitive development of radio over the public airwaves; and (3) offends against the Constitution of the United States by approving voluntary utility regulation enabling a monopoly to expand into a competitive private area to the detriment of independent business firms.

As we shall show, the strained and technical arguments mustered by the motions to dismiss cannot ob-

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[1] In addition to the previous expressions by the Justice Department to this effect, cited in Juris. St., p. 8 n. 5, the Department of Justice on February 20, 1959, again advised the Federal Communications Commission of "the purpose and intent of the Final Judgment that AT&T and its subsidiaries withdraw from the private communications field," and reiterated its position "that the decision of the Supreme Court of the State of California upholding a decision of the California Public Utilities Commission accepting a tariff voluntarily filed by the Pacific Telephone and Telegraph Company covering the installing, leasing and maintenance of communications equipment for private mobile communications systems, does not change the application of Section V of the Final Judgment prohibiting engagement in this activity with persons who were not lessees of such systems on March 11, 1956 and, in any event, after January 24, 1961." F.C.C. Dkt. No. 12708

sure the focal issue of unlawful monopoly sponsored by an agency of the state.

The substantiality of the issue is eloquently documented by the Telephone Company's sudden maneuver, first announced in its Motion (p. 13), to pull back from the California Commission its lease-maintenance "tariff" whose approval generated the broader controversy now before this Court. The ostensible reasons for this bolt cannot withstand scrutiny. The Telephone Company's asserted "uncertainty" as to the meaning of the decree (Mot., p. 13) can obviously be resolved by this Court before January 1961. Indeed, it could have been ended two years ago, after the first warnings by the Department of Justice, through a motion by the Telephone Company for a construction of the decree by the federal district court—rather than pushing the case through the regulatory commissions over the protest of injured competitors. Actually, the Telephone Company's withdrawal application to the California Public Utilities Commission on March 17, 1959 (one day after the date of the appellee Commission's Motion to Dismiss) highlights this Court's jurisdiction to resolve this clear and present controversy over issues of national significance. For the application indicates not a clear-cut and unqualified abandonment of Telephone Company activities in the private mobile radio field, but seeks a legal foundation to re-enter the private radio leasing business by economically equivalent arrangements under the ægis of regulatory agencies despite the antitrust injunction.[2]

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[2] See Application for Tariff Cancellation, pp. 12-13. Inasmuch as the Telephone Company has not seen fit to submit the text of its application for the tariff withdrawal as announced in its Motion, appellants have lodged a copy with the Clerk for the convenience of the Court.

Compare *Carpenters Union* v. *National Labor Relations Board*, 341 U.S. 707, 715 (1951); *Walling* v. *Helmerich & Payne, Inc.*, 323 U.S. 37, 43 (1944).

The Telephone Company's Radio Activities Have Sufficient Interstate Aspects To Bring the Antitrust Laws and the Communications Act into Play.

The motions of appellees, predicated heavily on asserted lack of "interstate commerce" (P.U.C. Mot., pp. 8, 13, 14, 15; Tel. Co. Mot., pp. 4, 17, 19), ignore that neither the antitrust laws nor the Communications Act exempt activities in California which radiate restrictive consequences beyond its borders.

It is axiomatic that the Sherman Act, which lends statutory force to the antitrust decree, is not rendered "inapplicable" merely because the Telephone Company's "tariff" covers private radio systems located within California. This Court has long held that the Sherman Act condemns monopolistic restraints wheresoever perpetrated—so long as their impact transcends local boundaries. *E.g., United States* v. *Employing Plasterers Ass'n of Chicago*, 347 U.S. 186, 189 (1954); *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 232 (1948). The private radio systems leased by the Telephone Company in California (and by other AT&T subsidiaries elsewhere) not only travel the inherently national domain of the radio spectrum, but involve equipment which admittedly is purchased "on the open market." (P.U.C. Mot., p. 23). Cf. *C. J. Community Services* v. *Federal Communications Commission*, 246 F. 2d 660, 663 (D.C. Cir. 1957). Most important, these private mobile radio systems may be leased only to persons expressly licensed by the Fed-

eral Communications Commission to occupy frequencies in the radio spectrum. Hence the appellee Public Utilities Commission's assertions of antitrust immunity by the asserted "intrastate" character of the Telephone Company's activities is unsupported and untenable.

In the same way, the prohibitions and policies of the Communications Act for the competitive development of radio do not stop at California's borders. The appellee Commission asserts that Section 2(b) of the Communications Act, 47 U.S.C. § 152(b), reserves to the states a plenary power over certain "intrastate" radio activities. (Mot., pp. 7-8, 13, 19). But as this Court long ago declared, "No state lines divide the radio waves, and national regulation is not only appropriate but essential to the efficient use of radio facilities." *Federal Radio Commission* v. *Nelson Bros. B. & M. Co.*, 289 U.S. 266, 279 (1933). And this Court has consistently recognized the pervasive national policies incorporated by Congress in the Communications Act of 1934 for the preservation of the public interest in the radio spectrum. *E.g., National Broadcasting Co.* v. *United States,* 319 U.S. 190, 213-214, 217 (1943). Indeed, Congress in Section 3(e) of the Act, 47 U.S.C. § 153(e), guarded against a myopic view of the concept of "interstate communication" by omitting the provisions of Title III from the scope of regulatory delegation to the states, and by furthermore ensuring that the definition of "interstate communication" must abide by the statutory "context." Besides the basic theme of competition for radio in Title III, Congress in Section 313 pointedly specified that the federal antitrust laws were to apply to interstate radio communications as well as to "trade in radio apparatus and devices entering into or *affecting*" interstate commerce. 47 U.S.C. § 313.

The position of appellees points up the public importance of the issues at bar. In their view, the federal authority is apparently limited to the parcelling out of the public radio spectrum by the Federal Communications Commission—but without the paramount federal policy of competition to foster the development of the radio art and to protect the public from monopolistic exploitation.

If the jurisdictional and definitional provisions of the Communications Act are to be construed to oust the overall policies in Title III of that Congressional enactment from the field of private mobile radio, as appellees maintain, only this Court should render such a far-reaching pronouncement.

The Conflict of the California Rulings With the Injunction of the Federal Antitrust Decree is Unresolved.

The clash with federal law posed by the Public Utilities Commission's authorization of a business activity enjoined by a federal antitrust decree cannot be minimized. Admittedly the Telephone Company filed its so-called tariff "[w]ithin a few weeks after the consent decree" (P.U.C. Mot., p. 3)—despite its prohibition on the lease-maintenance of private radio systems as repeatedly confirmed by the Department of Justice. While the Telephone Company vigorously maintains that the "Department misconstrues the consent decree" (Mot., p. 13), these protestations are out of tune with the Telephone Company's distaste for a judicial resolution of the crucial issue—*i.e.*, whether voluntary submission to agency regulation permits the Telephone Company to break out of its legal containment to invade businesses

which are not genuine "common carrier" services and do not constitute "natural monopoly."

Nor is this Court now powerless, as the Telephone Company suggests, to resolve with finality this controversy over a historic antitrust decree. Antitrust issues arise not only in prosecutions by the Department of Justice in the federal district courts, but can come into play in the context of state court litigation which culminates in Supreme Court review of substantial federal questions decided by the state judiciary. *E.g., Straus* v. *American Publishers' Ass'n*, 231 U.S. 222, 233 (1913). And antitrust consent decrees are no less amenable to this Court's appellate jurisdiction than other consent decrees entered by federal courts whose provisions are construed in a state court controversy. See *Donohue* v. *Vosper*, 243 U.S. 59, 63-64 (1917). Indeed, unless it were held that state tribunals lack all jurisdiction over antitrust issues, ultimate appellate review by this Court of state antitrust adjudications is bound to follow.[3]

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[3] The Telephone Company's suggestion that the court entering the decree retains *exclusive* jurisdiction over its application is baseless. See, *e.g.*, *American Securit Co.* v. *Hamilton Glass Co.*, 254 F. 2d 889, 895 (7th Cir. 1958); *United States* v. *Libbey-Owens-Ford Glass Co.*, 1958 CCH Trade Cases, par. 69,147 (N.D. Ohio 1958); *American Securit Co.* v. *Shatterproof Glass Corp.*, 166 F. Supp. 813 (D. Del. 1958); cf. *Switzer Bros., Inc.* v. *Byrne*, 242 F. 2d 909 (6th Cir. 1957). Also, the Federal Communications Commission recently construed the AT&T decree adversely to the Telephone Company in *Connecticut Water Co.*, 25 F. C. C. 1367 (1958). The express jurisdictional reservation in Section XVII of the decree, which appellee apparently deems important (Mot., pp. 11, 21), is a mere restatement of chancery powers in the decree court. See, *e.g.*, *United States* v. *Swift & Co.*, 286 U.S. 106, 114 (1932).

The Telephone Company's point, if valid, would dictate an automatic nullification of the decree rulings below for want of jurisdiction by the state tribunals.

The other antitrust disclaimers by appellees are untenable or largely answer themselves: (1) The so-called tariff approved by the PUC on its face and as described by the PUC opinion itself (Tariff No. 108-T, Orig. Sheets 10, 12-13; 55 Cal. P.U.C. 387, 389-90; reprinted at Tel. Co. Mot., App. pp. 4-5) reflects tying arrangements whereby the Telephone Company will lease the radio station equipment, together with all repair and replacement parts—precisely the type of arrangement which has been consistently condemned by the courts as a device for the unlawful extension of monopolies and exclusion of competitors.[4]

(2) Surely the Telephone Company can gain no comfort from this Court's recent decision in the *RCA* case. *United States* v. *Radio Corp. of America*, 27 U.S. L. Week 4179 (Feb. 24, 1959). That decision, which held that the FCC could not insulate a trans-

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[4] In addition to *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1 (1958), see, *e.g.*, *United States* v. *United Shoe Machinery Co.*, 110 F. Supp. 295, 352 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954); *Stanley Co. of America* v. *American Tel. & Tel. Co.*, 4 F. Supp. 80, 82 (D. Del. 1933); *General Talking Pictures Corp.* v. *American Tel. & Tel. Co.*, 18 F. Supp. 650, 655-657 (D. Del. 1937).

In this sophisticated antitrust age, the Telephone Company's "tariff" would certainly not fly an express red-streamer "condition that a station licensee must not purchase from or deal with any other supplier," whose absence is stressed by the Commission (Mot., p. 16). "For purposes of the Clayton Act, the requisite condition not to deal in the goods of another may be inferred from the practical effects of the tying arrangement," which "may achieve a result equivalent to total exclusion of other sellers without the formality of expressly saying so." *Times-Picayune Pub. Co.* v. *United States*, 345 U.S. 594, 607 n. 23, 615 n. 35 (1953).

The California Commission's doubt that the FCC would refuse to grant radio licenses to lessees of private radio systems from Pacific (Mot., p. 17), is apparently not shared by the latter, which advised the California Commission one day later to the contrary. Application for Tariff Cancellation, p. 9.

action against subsequent antitrust attack by the Department of Justice, was not intended to bestow immunities on any monopolistic practices prohibited by the Communications Act; nor was it intended to relieve the FCC from its specific statutory obligation to enforce the pertinent provisions of the Clayton Act against "common carriers" such as the Telephone Company. Section 602(d) of the Communications Act; see 15 U.S.C. § 21.

(3) Finally, the rationale of this Court's *Benanti* decision, 355 U.S. 96 (1957), which prohibited states from vitiating the Communications Act's policy against wire-tapping, is highly in point. The federal policy against monopolistic practices in radio, expressed by Title III of the Communications Act, surely commands no lesser respect by state agencies than the federal policy in Section 605 against clandestine interception of messages.

Substantial Constitutional Problems Result from State Utility Regulation Threatening to Destroy Independent Competitors.

Appellees' assurances that the invasion of the private mobile radio field by the telephone monopoly is a virtual blessing for competition (P.U.C. Mot., pp. 20-23; Tel. Co. Mot., p. 21) are at war with the facts and the "realities of the situation" which reveal a serious Constitutional question.

Entry of the Telephone Company into areas served by private enterprise is a requiem for independent competitors. Economic attrition of rivals may be fostered not only by exclusionary tactics, but also by destructively low rate levels subsidized by the

guaranteed return from the telephone monopoly operation for which the general public subscriber must pay.[5] The rapid recorded rise in private systems leased by the Telephone Company—from 8 to 214, including 1702 mobile units, between 1953 and 1956 in California alone (Tel. Co. Mot., App. p. 6)—belies the effort to play down the Telephone Company's potential for engulfing the private mobile radio field. (P.U.C. Mot., p. 4; Tel. Co. Mot., p. 7).

Understandably, the Department of Justice admonished the Federal Communications Commission two years ago that any approval of a similar Telephone Company tariff "might substantially lessen the competition which now exists in the leasing, as well as the manufacture and sale, of equipment for use in private communication systems," and "would tend to strangle the growth of the radio equipment industry."[6] Nor may the appellees obscure such "realities of the situation," accurately perceived by the minority opinion below (Juris. St., p. A19), by consistently labeling the opinions of the PUC as "factual findings" which are somehow impervious to judicial review.

The rationale of the PUC corroborates the need for plenary review of the Constitutional issue. According to the Commission, "A regulated monopoly is perfectly consistent with the public interest," for "as a general proposition, public regulation removes the curse of illegality from such a monopoly." (Mot.

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[5] In this very case, the California PUC staff found that Pacific's challenged private mobile radio operations were conducted at *a loss of 3%*, but was overruled by the Commission which deemed the Telephone Company's contentions "more convincing." 55 Cal. P. U. C. 387, 404; reprinted at Tel. Co. Mot., App. p. 30. The Commission was "reluctant to require a utility to charge a higher rate than in its judgment is necessary." *Ibid.*

[6] F. C. C. Dkt. No. 11972, March 27, 1957 and September 6, 1957.

p. 21). But the Constitutional philosophy of a free society can tolerate the proliferation of even regulated monopolies only after *some* minimal demonstration of public necessity. As the three minority Justices pointed out, such a showing not only is glaringly absent here, but is affirmatively contradicted by the Commission's own opinion.[7]

Above all, a cardinal issue of contemporary concern is the extent to which the blanket of agency regulation may cover a monopoly-minded corporation so as to deflect antitrust policies and to smother competition, in direct conflict with the Constitutional considerations behind valid public utility controls. Compare *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481 (1958); *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83 (1957).[8]

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[7] It is not supplied by the majority's observation, stressed by the Telephone Company (Mot., p. 18), that private mobile radio equipment is used by police and fire departments and other public service bodies. This logic would view the sale of pencils or gasoline, equally used by these agencies, as a "public utility" service in California if purveyed by the Telephone Company.

[8] The Telephone Company cannot deny that it courted the state Commission's regulation by a voluntary "tariff" filed on the heels of the federal antitrust decree. The veiled suggestion that Pacific actually resisted public utility status for the private radio business (Mot., pp. 22-23) is misleading. The 1954 and 1955 proceedings before the California Commission, see 53 Cal. P. U. C. 662; 54 Cal. P. U. C. 75; compare 55 Cal. P. U. C. 387, 395-396, held that the Telephone Company must not finance destructively low prices for radio equipment leasing from its telephone revenues to the burden of the public subscriber. The Telephone Company naturally opposed this charge and the associated requirement that it file such private equipment contracts for the Commission's surveillance over the disposition of its assets. But appellees cannot urge that these "assertions of jurisdiction by the Commission" and its inchoate "earlier view" are the equivalent of the public utility status and regulation sought and given after entry of the consent decree.

The Issues are Properly Presented to this Court by Appellants.

The Telephone Company's denial of this Court's power to consider this case on appeal under 28 U.S.C. § 1257(2), rather than via certiorari under 28 U.S.C. § 1257(3), rests on an empty technicality which is superseded by the practical logic of more recent decisions.

The California Supreme Court sustained against federal challenge the Public Utilities Commission's ruling as a lawful exercise of its powers legislatively delegated by the Public Utilities Code. Hence, the validity of California's enabling constitutional and code provisions was drawn into question,[9] and the Telephone Company's characterization of the Commission's determination as "judicial" rather than "legislative" is beside the point. Cf. *McCollum* v. *Board of Education*, 333 U.S. 203, 206 (1948); *Atchison, T. & S. F. Ry. Co.* v. *Public Utilities Commission of California*, 346 U.S. 346, 348 (1953).[10]

If the labels of "legislative" versus "judicial" *were* meaningful and material for this purpose, the informal investigative hearing conducted before the Commission was surely as "legislative" and non-"judicial" as a proceeding can get. The Commission not only did not purport to operate within the procedural limitations of a judicial proceeding, but even denied requests for

[9] The several interlacing California provisions are detailed in the California Supreme Court's opinions, reprinted in appellants' Jurisdictional Statement at pp. A5-A6 and again at A16.

[10] The two per curiam orders cited by the Telephone Company (Mot., p. 14) are bare of any discussion supporting the assertion, and the state court ruling cited (Mot., p. 15) concerned the application of *res judicata* to California administrative practice.

a formal report by the presiding officer (55 Cal. P.U.C. 387, 388; reprinted at Tel. Co. Mot., App. p. 3).[11]

And even if the Telephone Company's contentions had substance, 28 U.S.C. § 2103 provides for certiorari consideration of the substantial federal issues tendered by the appellants. *E.g., Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 290 (1958).

Similarly far-fetched is the Telephone Company's suggestion that appellants lack a sufficient legal "interest" to invoke this Court's powers of review. It is plain from the issues and the opinion of the three minority Justices that the majority decision of the California Supreme Court unleashed the Telephone Company to invade the private mobile radio business and jeopardize appellants' economic survival. (See minority opinion, Juris. St., p. A19). Whether the Commission's order undertakes to "regulate" these appellants at this time is irrelevant. It is the controversy over the *unlawful* competition on the part of the Telephone Company, barred by the federal antitrust decree and Communications Act, which provides the basis for resort to this tribunal's appellate juris-

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[11] Actually, the elusive nature of these labels is confirmed by the ruling of the Federal Communications Commission, at the instance of the Telephone Company, that even such "jurisdictional" issues in the FCC's parallel investigation into the Telephone Company's "tariff" for private mobile radio systems were legislative-type "rule-making" rather than "adjudication"—thereby avoiding an intermediate decision by a Hearing Examiner. *American Telephone & Telegraph Co.*, 22 F. C. C. 1220, 1225 (1957).

Totally without merit is the Telephone Company's intimation (Mot., p. 9 n. 1) that the antitrust decree issue was not individually raised below, for the court below "actually considered and decided" the consent decree question. *Charleston Federal Savings & Loan Ass'n* v. *Alderson*, 324 U.S. 182, 185-186 (1945); *McCollum* v. *Board of Education*, 333 U.S. 203, 207 (1948). Compare the Telephone Company's Answer to Petitions for Review by the court below, pp. 41 *et seq.*

diction by these commercially aggrieved independent rivals. *E.g., Chicago* v. *Atchison, T. & S. F. Ry. Co.*, 357 U.S. 77, 83 (1958); *Frost* v. *Corporation Commission*, 278 U.S. 515, 521 (1929).

CONCLUSION

The appellees have failed to dispel the substantial federal questions arising from the decision below which warrant plenary resolution by this Court. Appellants respectfully urge, therefore, that the Court permit this case to be heard on the merits.

If any question as to "mootness" should develop from the unilateral request for tariff cancellation filed on March 17, 1959 by the appellee Pacific Telephone and Telegraph Company before the appellee Public Utilities Commission, appellants respectfully request an opportunity to address themselves by appropriate pleadings to this Court's prerogative to pass on the judgment below which contravenes a continuing antitrust injunction.

Respectfully submitted,

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JAMES R. BROWNING, Clerk

In the Supreme Court

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OCTOBER TERM, 1958

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vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA
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THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY,
Appellees.

On Appeal from the Supreme Court of the State of California

REPLY OF APPELLEE THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY TO APPELLANTS' OPPOSITION TO MOTION TO DISMISS APPEAL

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1958

No. 719

COMMERCIAL COMMUNICATIONS, INC., et al.,
and
WATSON COMMUNICATIONS SYSTEMS, INC., et al.,
Appellants,
vs.
PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA
and
THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY,
Appellees.

On Appeal from the Supreme Court of the State of California

REPLY OF APPELLEE THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY TO APPELLANTS' OPPOSITION TO MOTION TO DISMISS APPEAL

Not until the last two and a half pages of their opposition to the motions to dismiss do appellants get down to

the specific grounds on which our motion is based. We, therefore, start at that point, returning later to the legal irrelevancies and factual misstatements contradictory of findings below with which the earlier part of appellants' opposition is filled.[1]

This appeal is not authorized by the statute (28 U.S.C. 1257(2)) because it does not draw into question the validity of a state statute, but rather the validity of a *nonlegislative order* of the California Public Utilities Commission (Tel.Br. 14). This point is supported by authorities already cited (Tel.Br. 14). Appellants, however, say that it rests on "an empty technicality which is superseded by the practical logic of more recent decisions" (Opp. 12). Since the "more recent decisions" are not cited, further comment appears unnecessary.

Appellants go on to say that the decision below, by sustaining action of the California Commission, draws into question "the validity of California's enabling constitutional and code provisions" (Opp. 12). What "constitutional and code provisions" are invalid, and why, are matters left unspecified.

In *Wilson v. Cook* (1946) 327 U.S. 474, this Court said (p. 482):

> "In order to support an appeal to this Court it is necessary that the question of the validity of the state taxing statute be either presented to the state court

[1] Appellants' opposition will herein be abbreviated as Opp. We abbreviate into Tel.Br. the "Motion of Appellee The Pacific Telephone and Telegraph Company to Dismiss Appeal and Brief in Support Thereof." References herein to the opinions of the California Supreme Court and Public Utilities Commission will be given as in our former brief.

> or decided by it. It is not sufficient merely to attack, as here, the tax levied under the statute, or 'the right to collect the tax' which has been levied, or to show that the validity of the tax alone has been considered. *Charleston Assn. v. Alderson, supra,* 185 and cases cited. For 'the mere objection to an exercise of authority under a statute, whose validity is not attacked, cannot be made the basis of an appeal. *Jett Bros. Co. v. City of Carrollton,* 252 U.S. 1, 6."

See also many other citations in *Wilson v. Cook* supra (327 U.S. 482); also *Hanson v. Denckla* (1958) 357 U.S. 235, 245.

Appellants next argue that if an appeal will not lie, the statute (28 U.S.C. 2103) nevertheless provides "for certiorari consideration of the substantial federal issues tendered by the appellants" (Opp. 13). As against this contention, and as pointed out in our former brief (pp. 16-17), the order below regulates only the appellee Telephone Company. It applies to nobody else. It neither directs nor prohibits any action by appellants. In such circumstances neither appeal nor certiorari is available to appellants (see authorities in our former brief, pp. 16-17). No case known to us holds or suggests that an unregulated person has standing here to contest an order regulating some other person as a public utility. The two cases cited by appellants in support of their alleged interest (Opp. 14) involved facts not comparable with the case at bar.

Since appellants have no standing to appeal because they do not draw into question the validity of a state statute, and have no standing either on appeal or certiorari because the order appealed from does not apply to

them, it follows, we submit, without more that the motion to dismiss should be granted. We nevertheless refer to appellants' alleged federal questions, again submitting that none of them have any substance.

The supposed right which appellants here seek to protect is the right to be free of Telephone Company competition. This is evident on the record; it was noted below—"On the grounds of preserving competition, they seek to bar a competitor from the field" (Cal.Comm. 20)—and it is expressly avowed by appellants in aid of their supposed interest to maintain this appeal (see, for example, Opp. 13). But freedom from competition is not a right protected by the Fourteenth Amendment (*Tennessee Power Co. v. T.V.A.* (1939) 306 U.S. 118, 138-140), and appellants' claim thereto presents no substantial federal question (*Peerless Stages, Inc. v. Railroad Commission of California* (1935) 296 U.S. 540).

We point out further that while appellants refer to "Substantial Constitutional Problems" (Opp. 9), they do not mention the Fourteenth Amendment in their opposition to the motion to dismiss; hence, presumably, their claims based on the amendment have been abandoned. The point made by the jurisdictional statement was that the Fourteenth Amendment prohibits the state from regulating the type of intrastate radiotelephone communication service involved in this case. There is no substance to this contention as shown in our former brief (Tel.Br. 18-19).

As to the Federal Communications Act, the case at bar involves an intrastate tariff. The statute expressly recog-

nizes state jurisdiction of "intrastate communication service by wire or radio of any carrier" (see Federal Communications Act, sec. 2(b) and Tel.Br. 19-20). Consequently, the approval of an intrastate tariff as being justified by state law certainly does not violate any policy of the federal statute.

As to appellants' arguments under the consent decree of the United States District Court of New Jersey, we wish to add little to things said in our former brief (Tel.Br. 9-12, 20-22). It is, we submit, altogether inappropriate to ask this Court to construe or interpret the New Jersey decree in the present case. The New Jersey record is not here. If, as reasonably suggested by the Federal Communications Commission, the decree is to be construed in the light of some *intent* not evident from the language of the decree, such construction should appropriately be made in the first instance by the New Jersey District Court (see quotation from F.C.C., Tel.Br. 12).

Appellants' opposition is completely reckless in asserting matters not brought up below. For example, appellants now attack the Telephone Company rates contained in the California order (Opp. 9-10)—this without offering a particle of evidentiary support, and notwithstanding the express statement of the California Commission that the case was fought primarily on jurisdictional grounds "and the interested parties had virtually nothing to offer as to the adequacy of the proposed rates" which the Commission sustained as reasonable (Cal.Comm. 30). Appellants did not challenge the reasonableness of the rates in the Supreme Court of California (see Cal.Sup.Ct. 2). As a matter of fact they did not raise the point even in their

notice of appeal to this Court and bring it up for the first time in their opposition to the motions to dismiss.

As another instance, appellants charge that the arrangements between the Telephone Company and its customers involve unlawful tying arrangements (Opp. 8)—another point never suggested below. The point is unsubstantial on its face; it may, however, be added that appellants are in effect charging themselves with illegality, since their own jurisdictional statement says (p. 18) that the pattern of appellants' arrangement with customers in the field here involved is "identical" with that of the Telephone Company.

Appellants' opposition, like their jurisdictional statement, proceeds in absolute disregard of the findings below. Pertinent findings, summarized in our former brief, are explicit to the effect that this case involves no monopoly, no tendency to monopoly, no unfair competition by the Telephone Company, no threat to the continuance of competitors (including appellants) who hold more than 95 per cent of the California business, and—as is obvious—that regulation is a competitive handicap, not an advantage (see record quotations and references Tel.Br. 8-9, 17-18).

Appellants, without evidentiary support or reference, assert the contrary of all these findings.

Appellants again charge, with even more lurid adjectives and metaphors than those contained in their jurisdictional statement, that the California Supreme Court has authorized the Telephone Company to violate the antitrust laws, to violate the New Jersey consent decree, to circumvent the jurisdiction of the Federal Communications Commission, etc., etc. (see, for example, Opp. 4, 5,

6, 7, 8, 11). The California Court did nothing of the kind. It affirmed the acceptance by a regulatory commission of an intrastate public utility tariff as being proper under California law. If the Telephone Company should in any action under this tariff infringe any federal law, order or decree—which it has not done—all usual remedies are available. The decision below cuts off none of them. It is absurd, irresponsible, and completely lacking in the respect due the Supreme Court of California to charge that court with trying to circumvent federal authority in the interest of private wrongdoing.

In our former brief it was pointed out (Tel.Br. 13) that the Telephone Company had recently filed with the California Commission an application for authority to cancel its Tariff Schedule No. 108-T, and to withdraw from the furnishing of private mobile communications service on a lease-maintenance basis by January 24, 1961, except as to service which may be provided to the United States Government. The Commission has taken no action on this application, but has set it for hearing on April 27, 1959.

We respectfully submit that the appeal should be dismissed and certiorari should be denied.

Dated, April 20, 1959.

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